No. 2374

United States

Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corporation,

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Filmer Bros. Co., Print. 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

Messrs. CANNON, FERRIS & SWAN, Spokane, Washington,

Messrs. BLACK & WERNETTE, Coeur d'Alene, Idaho,

Attorneys for Plaintiff in Error.

Messrs. ELDER & ELDER, Coeur d'Alene, Idaho,

Attorneys for Defendant in Error.

In the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY,

Defendant.

Complaint.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges:

I.

That the plaintiff is now and at all the times herein mentioned was a citizen and resident of the State of Idaho.

II.

That at all the times herein mentioned the defendant was and yet is a corporation duly organized and existing under and by virtue of the laws of the State of Maine, and engaged in business in the State of

Idaho, and that said defendant is a foreign corporation engaged in business in the county of Kootenai, State of Idaho.

III.

That on or about the 9th day of November, A. D. 1911, said defendant was loading logs on cars at Bovill, Idaho, and at said time the said defendant was engaged in lumbering and lumber operations.

IV.

That on or about the 9th day of November, 1911, Harry Harkins was in the employ of the defendant as top loader, working on cars loading logs at Bovill, Idaho. That the duties of the [1*] said Harry Harkins in the ordinary discharge thereof were to assist in loading the logs and placing the same after they had been lifted and raised onto the cars.

V.

That the plaintiff is the wife and sole surviving heir at law of Harry Harkins, a man of the age of forty (40) years, and up to the time of sustaining the injuries hereinafter mentioned resided with his wife, the above-named plaintiff at Spirit Lake, Kootenai County, Idaho. That at the time during his life up to the time he sustained the injuries, hereinafter set out, the said Harry Harkins had been a strong, bright and healthy man, and in all ways and respects a companion and comfort to the plaintiff, and for a long time prior to sustaining said injuries had been earning and was capable of earning from one hundred ($100.00) to one hundred and fifty ($150.00) dollars per month. That said Harry Hark-

*Page number appearing at foot of page of original certified Record.

ins was capable of earning large sums of money which he contributed to this plaintiff for her support and maintenance. That the said Harry Harkins was earning the sum of three and 50/100 ($3.50) dollars per day from said defendant as top loader at the time he received the injuries hereinafter set out.

VI.

That it was the duty of Harry Harkins to assist in loading logs and to assist in placing the logs on cars and in addition thereto it was the duty of the said Harry Harkins to perform any work necessary in and about the place where they were loading logs, when called upon by the foreman in charge of said work, and it was the duty of said Harry Harkins to do such work as was necessary or directed by said foreman or other employees in charge of said work. [2]

VII.

That Harry Younkin was foreman and in charge of the work for defendant where Harry Harkins was working, in general charge of the loading of logs at the place where Harry Harkins was working. That said Harry Younkin also was foreman and had charge of the skidding of logs in placing said logs near the track so the same could be loaded on cars, and that the said Harry Younkin had general superintendence and control of the work upon which Harry Harkins was working and of the said Harry Harkins. That in addition to the said Harry Younkin one W. M. Bailey, engineer, had charge of the work where Harry Harkins was working and it was the duty of the said Harry Harkins to follow the directions and

to take orders from the said W. M. Bailey, and that in the absence of the foreman the said W. M. Bailey had complete control and supervision of the work on which Harry Harkins was engaged and of said Harry Harkins.

VIII.

That it was the duty of Harry Harkins to do said work as was directed by said Harry Younkin, and W. M. Bailey, or either of them, and to assist in said work as he was directed to perform by them or by either of them, and the said Harry Harkins was under the supervision, control and direction of the said representatives of the defendant, and each of them. That on or about the 9th day of November, A. D. 1911, the said Harry Younkin ordered and directed Harry Harkins, the husband of this plaintiff, to assist in skidding logs at a point on the Washington Idaho & Montana R. R. about seven miles from Bovill, in Latah County, Idaho. That the said defendant was skidding logs at said place with a crew of men under the charge, direction, superintending and control of Harry Younkin. That the said Harry Younkin instructed [3] and directed the said Harry Harkins to leave his work as top loader and to assist in the skidding of logs at said place.

IX.

That on the 9th day of November, A. D. 1911, the said defendant was skidding logs at the place where the injury to the said Harry Harkins occurred with a Marion steam loader. That the Marion steam loader is not suitable or adapted to be used as a skidding machine. That the said Marion steam

loader is not equipped with the whistle-cord, or any devise whatever for the purpose of giving signals. That the Marion steam loader, while being used by the said defendant as a skidding machine, was not provided with a haul back or was not provided with a whistle-cord or signal line of any kind. That on or about the 9th day of November, A. D. 1911, while the said Harry Harkins was engaged in the orderly, regular and careful discharge of his duties and service to the defendant he was ordered by said defendant and by its *fore-* and employees in charge of said work to assist in the skidding of logs, with a Marion steam loading machine. That said Harry Harkins was ordered to assist in pulling the cable up the hill, and to assist in giving signals to the engineer, that the said Harry Harkins did assist other employees of said defendant to pull the cable up the hill, and after the same had been fastened to a log Harry Harkins walked away from the cable about fifty (50) or sixty (60) feet to a place of apparent safety.

That thereafter, without any fault or negligence on the part of Harry Harkins, the said defendant, its employees, and officers in charge of said work, while attempting to pull a log up to and near the railroad track, with said Marion steam loader, for the purpose of skidding and placing said logs near the railroad track, in order that said logs so skidded might be easily loaded on the cars, started the said Marion steam loader to [4] pulling and hauling the logs toward the railroad track and that the said defendant, its employees, managers, and agents in charge of said work, carelessly, negligently, wrongfully and

without regard to the safety of the employees and without regard to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and negligently and carelessly and without regard to the safety of said Harry Harkins stopped said Marion loading machine and allowed the said log to run and be dragged on to and against a tree, knocking said tree over on to the said Harry Harkins, and the said Harry Harkins was thereby mortally wounded, of which injuries the said Harry Harkins died on the 9th day of November, A. D. 1911, at *at* said county of Latah, State of Idaho.

That the death of Harry Harkins was wholly caused by and through the negligence and carelessness of said defendant, its managers, agents and employees, in operating and running the said Marion steam loader as a skidding machine, such machine not being adapted or suitable to be used for the purpose of skidding logs, and by and through the carelessness and negligence of said defendant, its agents, servants and employees in charge of said work, in the careless and negligent operation of said Marion steam loader; and said injuries were received by Harry Harkins without any fault or negligence on the part of said Harry Harkins.

X.

That the said injury to Harry Harkins *were* wholly caused through the carelessness and negligence of the said defendant in operating a Marion steam loader as a skidding machine; that the said Marion steam loader is not suitable and not adapted to the purpose of skidding logs, and that by reason of said

defendant's carelessness in using said Marion steam loading machine and by reason of the facts that said Marion steam loading machine has not [5] the necessary appliances for the safety of employees in skidding logs, the said Harry Harkins received the injuries herein above set out.

That the said Marion steam loading machine was unsafe and dangerous appliance with which to perform the work on which Harry Harkins was engaged, for the reason that it was not supplied or equipped with proper appliances and with the appliances commonly used on skidding machines. That the appliances furnished by said defendant for performing the said work, and so furnished to the said Harry Harkins, and to the other employees of the said defendant for the purpose of performing the said work were dangerous, and plaintiff further alleges that the said defendant, and its said employees in charge of said work, had and prior to the time of the injury to said Harry Harkins, as herein alleged, had full notice and knowledge that the said Marion steam loading machine was an unsafe machine for performing said work of skidding logs, and that the said loading machine was not a reasonably safe appliance or implement for the performance thereof, and defendant had full notice and knowledge that there was danger in the use of the Marion steam loading machine in skidding logs, that it had no means of giving signals and that employees were liable to be injured at any time by the use of the Marion steam loading machine for the purpose of skidding logs, and that full notice and

knowledge that there was danger with the use of said machine, and that employees were liable to receive injuries in the same manner as Harry Harkins was injured. That plaintiff alleges that Harry Harkins was inexperienced in said work, and that he did not know and did not appreciate that there was danger by the performance of the work in the manner adopted by the said defendant, and its servants in charge thereof.

The plaintiff further alleges that it was the duty of the defendant to adopt a reasonably safe plan or method in the performing **[6]** of said work, and it was the duty of said defendant to use reasonable precaution consistent with the nature of work, to prevent injury to said Harry Harkins and other employees of said defendant.

That the said work could have been rendered safe had said defendant used a regular skidding machine for the purpose of skidding said logs. That said defendant, its foreman, agents and employees in charge of said work, in exercising reasonable care and reasonable precaution, should have been able to know and did know that the said method used by said defendant in skidding the logs was an improper and unsafe method, and that said Marion steam loading machine was not a safe appliance or machine to be used for the purpose of skidding logs, and was an unsafe method of performing said work.

XI.

That on the 13th day of March, A. D. 1912, notices of the time, place and cause of said injuries were given to said defendant, and said notice was in

writing and signed by said plaintiff.

XII.

That by reason of the death of said Harry Harkins, caused by and through the carelessness and negligent act of the defendant, the Potlatch Lumber Company, as aforesaid, and by reason of the facts herein alleged, plaintiff becomes and is deprived of the services physical and mental labors and energies, comfort, happiness, society, and companionship of said Harry Harkins and is thereby damaged in the sum of twenty-five thousand dollars ($25,000).

WHEREFORE, plaintiff demands judgment against said defendant, the Potlatch Lumber Company, a corporation, for said sum of twenty-five thousand ($25,000.00) dollars, together with her [7] costs in this behalf laid out and expended.

ELDER & ELDER,
Attorneys for Plaintiff,
Residence and P. O. Address: Coeur d'Alene, Idaho.

State of Idaho,
County of Kootenai,—ss.

Susan Harkins, being first duly sworn, deposes and says that she is the above-named plaintiff, that she had read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

MRS. SUSAN HARKINS.

Subscribed and sworn to before me this 24th day of April, A. D. 1912.

E. F. CONKLIN,
Justice of the Peace, Kootenai County, State of Idaho, Spirit Lake Precinct.

[Endorsed]: Filed June 8th, 1912.

[Endorsed]: Filed in my office July 25th, 1912, at 9:30 A. M. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. **[8]**

In the District Court of the United States, for the District of Idaho.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant, Potlatch Lumber Company, and for answer to the complaint of the plaintiff herein alleges:

I.

Admits paragraphs I, II and *II,* of plaintiff's complaint to be true.

II.

Answering paragraph IV, defendant denies that on or about the 9th day of November, 1911, Harry Harkins was employed as top loader, and denies that he was working on cars loading logs at Bovill, Idaho. Denies that the duties of the said Harry Harkins in the ordinary discharge thereof were to assist in loading the logs and place the same after they had been lifted and raised into cars.

III.

Answering paragraph V of said complaint, defendant admits that at the time he was employed by this

defendant, Harry Harkins was earning the sum of $3.50 per day, but alleges that it has no knowledge or information sufficient to form a belief as to the other matters and things alleged in said paragraph V, and therefore denies the same. [9]

IV.

Answering paragraph VI of said complaint, defendant admits that it was the duty of Harry Harkins to perform such duties as he was directed to do by the foreman under whom he was employed.

V.

Answering paragraph VII of said complaint, the defendant admits that Harry Younkin was defendant's foreman and in charge of the work in which said Harkins was employed. Defendant denies that W. M. Bailey had charge of the work where Harry Harkins was working, or any work whatsoever, and denies that it was the duty of said Harry Harkins to follow the directions or to take orders from said W. M. Bailey or from any one other than the said foreman Harry Younkin, and denies that in the absence of the said foreman the said W. M. Bailey had complete control and supervision or any control or supervision whatever of the work in which said Harry Harkins was engaged or of said Harry Harkins.

VI.

Answering paragraph VIII of said complaint, defendant admits that it was the duty of Harry Harkins to do such work as he was directed to do by the foreman Harry Younkin, but denies that W. M. Bailey had any authority or control over the said Harry Harkins or that he was required to assist in

any work under the direction or control of said W. M. Bailey, or anyone other than the said Harry Younkin. Admits that on or about the 9th day of November, 1911, said Harry Harkins was assisting in skidding logs as alleged in said paragraph VIII, but denies that he was instructed and directed to leave his work as top loader or any other work by the said Harry Younkin or by anyone else, and denies that he was directed and instructed to assist in [10] skidding logs at said place or at any place or at all.

VII.

Answering paragraph IX of said complaint, defendant admits that on the 9th day of November, 1911, it was engaged in skidding logs with a Marion steam loader at the place where the injury to said Harry Harkins occurred. Defendant denies that a Marion steam loader is not suitable or adapted to be used as a skidding machine, and denies that said Marion steam loader is not equipped with a whistle-guard or any device whatever for the purpose of giving signals. Denies that the Marion steam loader, while being used by the said defendant as a skidding machine, was not provided with a haul-back, and denies that it was not provided with a whistle-guard or signal of any kind. Denies that on or about the 9th day of November, 1911, while said Harry Harkins was engaged in the orderly, regular and careful discharge of his duties and service to the defendant, that he was ordered by said defendant and by its foreman and employees, or by anyone in charge of said work, to assist in the skidding of logs with a Marion steam loader, or any other loading

machine or at all. Denies that said Harry Harkins was ordered to assist in pulling the cable up the hill and to assist in giving signals to the engineer or to anyone else. Denies that said Harry Harkins did assist other employees of the said defendant to pull the cable up the hill, and denies that after the same had been fastened to a log Harry Harkins walked away from the cable about fifty or sixty feet, or any distance whatever, to a place of apparent safety, or to any other place or at all. Denies that thereafter, without any fault or negligence on the part of Harry Harkins, the said defendant, its employees and officers in charge of said work, [11] or anyone else, while attempting to pull a log up to and near the railroad track with said Marion steam loader or any loader whatever for the purpose of skidding and placing said log near the railroad track or at any other point in order that said log so skidded might be easily loaded on the cars, started the said Marion steam loader to pulling and hauling the log toward the railroad track or to any other point or at all, and denies that the said defendant or any of its employees, managers or agents in charge of said work, or any work, carelessly, negligently, wrongfully or without regard to the safety of the employees or to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and denies that it negligently or carelessly or without regard to the safety of said Harry Harkins, or in any other manner, stopped said Marion loading machine or allowed the said log to be run or dragged on to and against a tree, knocking said tree over and on to the said Harry Harkins. Defendant admits that said Harry

Harkins died on or about the 9th day of November, 1911, from the injuries sustained by him while in the employ of this defendant, but denies that the death of said Harry Harkins was wholly caused or in any manner whatever caused by or through the negligence and carelessness of said defendant or its managers, agents or employees, in operating and running the said Marion steam loader as a skidding machine, or in any other manner or at all. Denies that said machine was not adapted or suitable to be used for the purpose of skidding logs, and denies that by or through the carelessness or negligence of said defendant or its agents, servants or employees in charge of said work, or any of them, or in the careless or negligent operation of said Marion steam loader, said injuries were received by said Harry Harkins, and denies that the said Harry Harkins was without fault or negligence on his part. [12]

VIII.

Answering paragraph X of said complaint, defendant denies that the said injury to Harry Harkins was wholly or in any manner whatever caused through the carelessness or negligence of said defendant in operating a Marion steam loader as a skidding machine or for any other purpose. Denies that said Marion steam loader is not suitable and adapted to the purpose of skidding logs, and denies that by reason of said defendant's carelessness in using said Marion steam loading machine or by reason of the fact that said Marion steam loading machine has not the necessary appliances for the safety of employees in skidding logs, the said Harry Harkins was injured or that such injuries were due to any neg-

ligence or carelessness of defendant whatever. Denies that the said Marion steam loader was an unsafe or dangerous appliance with which to perform the work in which Harry Harkins was engaged or that it was unsafe or dangerous in any manner whatsoever, or at all. Denies that it was not supplied or equipped with proper appliances and with the appliances commonly used on skidding machines. Denies that the appliances furnished by said defendant for performing the said work or furnished the said Harry Harkins or to the other employees of the said defendant for the purpose of performing the said work were dangerous, and denies that its said employees in charge of said work prior to the time of the injury to said Harry Harkins or at any other time or at all had full notice and knowledge or any notice or knowledge that the said Marion steam loading machine was an unsafe machine for performing said work of skidding logs or for any other purpose whatever or at all, and denies that said loading machine was not a reasonably safe appliance or implement for the performance thereof or for any other purpose or at all. [13] Denies that defendant had full notice and knowledge or any notice or knowledge whatever that there was danger in the use of the Marion steam loading machine in skidding logs or for any other purpose or at all. Denies that it had no means of giving signals or that the employees were liable to be injured at any time by the use of the Marion steam loading machine for the purpose of skidding logs or for any other purpose or at all, and denies that it had full knowledge and notice or any knowledge or notice whatever that there was danger

with the use of said machine or that the employees were liable to receive injuries in the same manner in which Harry Harkins was injured or in any other manner whatever or at all. Denies that Harry Harkins was inexperienced in said work, and denies that he did not know and did not appreciate that there was danger about the performance of the work in the manner adopted by this defendant and its servants in charge thereof. Denies that it was the duty of this defendant to adopt a reasonably safe plan or method of performing said work or any method or plan whatever, and denies that it was the duty of this defendant to use reasonable precaution or any precaution whatever consistent with the nature of the work to prevent injury to said Harry Harkins and other employees of said defendant or at all. Denies that said work could have been rendered safe had said defendant used a regular skidding machine or any other or different machine for the purpose of skidding said logs or for any other purpose or at all. Denies that said defendant or its foreman or agents or employees in charge of said work or any other work in exercising reasonable care or precaution, or any care or precaution whatever, should have been able to know or did know that the method used by said defendant in skidding the logs was an improper or unsafe method, and denies that [14] said Marion steam loading machine was not a safe appliance or machine to be used for the purpose of skidding logs, or denies that it was an unsafe method of performing said work or was in any manner unsafe whatever or at all.

IX.

Denies that on the 13th day of March, 1912, or at

any other time, notice of the time, place and cause of said injury or any notice whatever was given to said defendant. Denies that said notice or any notice was in writing or signed by the plaintiff.

X.

Denies that the death of said Harry Harkins was caused by or through the careless or negligent act of the defendant or any act whatever of the defendant Potlatch Lumber Company, and denies that plaintiff is damaged in the sum of $25,000.00 or any sum whatever through the carelessness or negligence of this defendant.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That it is a corporation as alleged in said complaint and has paid its license fee last due the State of Idaho.

2. That the injury resulting in the death of the said Harry Harkins was caused solely and alone by reason of the failure of said Harkins to keep out of the way of the logs which were being hauled and of falling trees, and said injury was not in any manner caused by this defendant or any of its agents or servants, for whose negligence, if any, defendant is or was responsible. [15]

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action defendant shows to the Court:

1. That the said Harry Harkins, in undertaking and performing the work in which he was then and there engaged, assumed and took upon himself all dangers and risks incident to the business in which

he was employed, including the dangers and risks of being struck by falling trees and branches thereof, and that he had full knowledge and notice of all said risks and dangers.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action defendant shows to the Court:

1. That if the injury resulting in the death of the said Harry Harkins was in any manner caused or contributed to by the carelessness or negligence of anyone except himself, the same was caused and contributed to by the fellow-servants of said Harry Harkins who were then and there working with him and for whose negligence defendant is and was not in any way responsible.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs and disbursements herein.

CANNON, FERRIS & SWAN, and
R. L. BLACK,
Attorneys for Defendant.

Residence and Postoffice Address of R. L. Black, Coeur d'Alene, Idaho. [16]

State of Idaho,
County of Kootenai,—ss.

R. L. Black, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, defendant named in the above-entitled action, and makes this verification for and on behalf of said corporation; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

R. L. BLACK.

Subscribed and sworn to before me this 31st day of August, 1912.

N. D. WERNETTE,
Notary Public in and for the State of Idaho, Residing at Coeur d'Alene, Idaho.

Service of foregoing Answer admitted, and a true copy thereof received this 31st day of August, 1912.

ELDER & ELDER,
Attys. for Plaintiff.

[Endorsed]: Filed August 31, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [17]

United States District Court, Northern Division, District of Idaho.

SUSAN HARKINS,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of Five Thousand and no/100 Dollars ($5,000.00).

J. W. ANDERSON,
Foreman.

[Endorsed]: Filed Nov. 22, 1913. A. L. Richardson, Clerk. [18]

United States District Court, Northern Division, District of Idaho.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on regularly to be heard in open court on the 20th day of November, A. D. 1913, before the Honorable Frank S. Dietrich, Judge presiding, sitting with a jury; and Elder & Elder appearing as counsel for the plaintiff; and Black & Wernette, and Cannon, Ferris & Swan appearing as counsel for the defendant. A jury was duly empanelled and sworn to try the cause; whereupon witnesses were sworn and examined, and evidence introduced on behalf of both the plaintiff and the defendant; and after argument of the respective counsel, the Court instructed the jury; whereupon after hearing the evidence and argument of counsel and the instructions of the Court, the jury, on the 22d day of November, A. D. 1913, retired in charge of officers of the Court, duly sworn for that purpose, to consider their verdict; and subsequently, on the same date, returned into the court with the following verdict:

(Title of Court and Cause.)

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of Five Thousand and no/100 Dollars ($5,000.00).

J. W. ANDERSON,
Foreman. [19]

NOW, THEREFORE, by reason of the law and the premises, and of said verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That said plaintiff, Susan Harkins, do have and recover of and from the Potlatch Lumber Company, the sum of Five Thousand and no/100 Dollars ($5,000.00), with interest thereon at the rate of seven per cent per annum from this date; together with plaintiff's costs and disbursements, necessarily incurred in this action, taxed in the sum of $379.55.

Done in open court this 22d day of November, A. D. 1913.

[Endorsed]: Filed Nov. 22, 1913. A. L. Richardson, Clerk. [20]

In the District Court of the United States for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY,
Defendant.

Order Extending Time to File Bill of Exceptions.

Upon motion of defendant, and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be and it is hereby granted sixty days after date within which to prepare, serve and file its proposed bill of exceptions in the above-entitled cause.

IT IS HEREBY FURTHER ORDERED, that stay of execution be and the same is hereby granted to said defendant upon the verdict and judgment rendered herein upon the 22d day of November, 1913, for said period of sixty days.

Done in open court this 28th day of November, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 28, 1913. A. L. Richardson, Clerk. **[21]**

In the District Court of the United States for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the defendant in the above-entitled cause and moves the Court to set aside the verdict of the jury rendered against it at a former date in the present term of said court, to wit, on the 22d day of

November, 1913, and the judgment of the court based thereon, and to grant defendant a new trial in said cause for the following reasons, and upon the following grounds, to wit:

I.

Irregularity in the proceedings of the court, jury and adverse party, by which defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Newly discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the trial. **[22]**

V.

Excessive damages appearing to have been given under the influence of passion and prejudice.

VI.

Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

The defendant alleges the evidence to be insufficient to support the verdict in the following particulars, to wit:

1. That there is no substantial evidence to authorize or justify said verdict or judgment thereon in favor of the plaintiff and against this defendant, in that said evidence fails to show that defendant was guilty of any negligence whatsoever which in any way was the approximate cause of the accident.

2. That the evidence shows conclusively that the accident resulting in the death of the deceased was caused by a log rolling against a tree and breaking it off, and striking the deceased while the work was being performed by defendant in the usual and customary manner, and that the risks and dangers incident thereto were assumed by the deceased.

3. That the testimony shows conclusively that the deceased had full knowledge of the manner in which the work, at the time of his death, was being performed by the defendant, and its servants and employees, and that he had assisted in performing the work in the same manner for more than two weeks prior to the date of his death.

4. That the evidence shows conclusively that the Marion steam loader, with which the work of skidding the logs was being performed at the time of the accident to the deceased, was a suitable and safe machine and appliance for doing such work, and it was usually and customarily used by the defendant **[23]** and other companies in like business for the purpose of skidding and loading logs within a radius of five hundred feet.

5. That the evidence fails to show that the Marion steam loader with which the deceased and his fellow-servants were working at the time of his death was in any way defective, or out of repair, or unsafe, or unsuitable in any manner whatsoever for the work in which it was being used, but, on the contrary, the evidence conclusively shows that the said Marion steam loader was in no way defective, and that it was a safe and suitable machine for the purpose for

which it was being used at said time and place.

6. That the evidence shows conclusively that the Marion steam loader was in general use all over the country by lumber companies for the purpose of both loading and skidding logs, and that it was not customary or usual to equip said machine with a signal wire or haul-back line, or to use a signal wire or haul-back line upon any machine when the same is used for the purpose of skidding logs within a radius of five hundred feet.

7. That the evidence wholly fails to show that the use of the Marion steam loader at the time and in the manner in which it was being used when the deceased met his death was in any way the proximate cause of the accident resulting in such death, but, on the contrary, the evidence conclusively shows that the accident could not and would not have been prevented by the use of a machine equipped with a signal wire or haul-back line.

8. That the evidence fails to show that the defendant was guilty of any negligence in using a Marion steam loader for the purpose of skidding logs within a radius of five hundred feet, without having same equipped with a signal wire or haul-back line, but, on the contrary, the evidence shows [24] conclusively that it is customary and usual to skid logs for a distance of five hundred feet or less, without using either a signal wire or haul-back line upon the machine.

9. That the evidence fails to show that the use of said Marion steam loader for the purpose and in the manner it was being used at the time of the ac-

cident to the deceased was more dangerous than other machines customarily used for skidding logs within a radius of five hundred feet, or that defendant did not act in a reasonable and prudent manner by so using said Marion steam loader.

VII.

Errors in law occurring at the trial:

1. On account of the insufficiency of the evidence to show any liability on the part of the defendant for the death of the deceased, as hereinbefore fully set out under the sixth ground of this motion.

2. The Court erred in denying defendant's motion for nonsuit and a dismissal of this action at the close of plaintiff's case, for the reason that the plaintiff has failed to show that the defendant was guilty of any negligence whatever in the premises.

3. The Court erred in denying defendant's motion for a directed verdict at the close of all the testimony in said cause, for the same reasons as stated under the sixth ground of this motion.

4. The Court erred in refusing to grant defendant's request to direct the jury to return a verdict for the defendant, for the same reasons as hereinbefore set out in this motion.

5. The Court erred in refusing to permit defendant to question plaintiff's witness, Harry Younkins, upon cross-examination, as to the usual and customary manner of performing [25] the work of skidding logs within a radius of four or five hundred feet, and in sustaining plaintiff's objections to such questions propounded to the said Harry Younkins upon cross-examination by the defendant.

6. The Court erred in refusing to permit defendant's witnesses to state whether, in their opinion, the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet, and in sustaining plaintiff's objections to such questions propounded by the defendant, said witnesses having shown that they were thoroughly experienced in work of that character, had full knowledge thereof, and were qualified and competent to express their opinion on the subject.

7. The Court erred in ruling that the question of whether the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet was for the jury to decide, and that it was not a subject for expert testimony.

8. The Court erred in permitting plaintiff to prove, over defendant's objections, the use of a haul-back line and signal wire in skidding logs, and the effect a haul-back line and signal wire could or would have upon the movements of logs being skidded by a machine equipped with a signal wire and haul-back line.

9. The Court erred in instructing the jury that "The question still remains for you to answer, viz., whether this method (without the use of a haul-back line) was more hazardous than the other referred to, viz., with a haul-back," for the reason that such instruction did not correctly state the law, but tended to mislead the jury as to the master's duty relative to furnishing his servant with a reasonably safe

place to work [26] and reasonably safe tools and appliances.

R. L. BLACK and
CANNON, FERRIS & SWAN,
Attorneys for Defendant.

I hereby certify that the within petition for new trial was by the defendant on this day presented to me for my certificate allowing the same to be filed, and I hereby certify that I allowed the same to be filed.

Dated this 2d day of December, 1913.

FRANK S. DIETRICH,
Judge.

Due service of the within Petition by receipt of a true copy thereof, admitted this 2d day of December, 1913.

ELDER & ELDER,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 2, 1913. A. L. Richardson, Clerk. [27]

Order Denying Petition for New Trial.

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Tuesday, the 2d day of December 1913. Present: Hon. FRANK S. DIETRICH, Judge.

No. 553.

SUSAN HARKINS

vs.

POTLATCH LUMBER COMPANY.

On this day the defendant's motion for a new trial came on to be heard and after argument by Charles E. Swan, Esq., on behalf of defendant, and the motion, and Robert H. Elder, Esq., against said motion, the Court being fully advised in the premises, ordered that said motion for new trial be and the same is hereby denied. To which ruling the defendant by its counsel then and there excepted in due form of law, which exception is allowed. [28]

In the United States District Court for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on to be heard at Coeur d'Alene, Idaho, in the above court, before Honorable FRANK S. DIETRICH, Judge, and a jury, the plaintiff being represented by Messrs. Elder & Elder, and the defendant by Messrs. Cannon, Ferris & Swan (by Mr. Swan), on the 20th day of November, 1913, and the following proceedings were had, to wit:

A jury of twelve men was duly and regularly empaneled and sworn to try said cause. [29]

[Testimony of William Bailey, for Plaintiff.]

WILLIAM BAILEY, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. William Bailey.

Q. Where do you reside? A. Bovill.

Q. Were you working for the Potlatch Lumber Company on or about November 9th, 1910?

A. Yes, sir.

Q. At the time Mr. Harkins received the injuries from which he died? A. Yes, sir.

Q. What were you doing at that time, Mr. Bailey?

A. I was running the loader.

Q. How? A. Running the loader.

Q. What kind of a loader? A. Marion loader.

Q. Will you describe that machine to the jury?

A. Well, it is a machine used for loading logs.

Q. How is it equipped, Mr. Bailey?

A. With a pair of tongs and a cable, is about all.

Q. What kind of a machine is it?

A. It is a Marion steam loader.

Q. Is it run by steam? A. Yes, sir.

Q. Is it equipped with a drum for the purpose of rolling the cable on the drum? A. Yes, sir.

Q. What sized cable does it use?

A. It uses five-eighths. [30]

Q. What size cable was on this machine at that time? A. Five-eighths.

(Testimony of William Bailey.)

Q. Where does this machine sit, where is it used?

A. It sits on a car.

Q. How is it transferred from one car to another, or is it transferred from one car to another?

A. Yes, sir.

Q. How is it transferred, Mr. Bailey?

A. By means of a cable.

Q. A track laid from one car to another, and then run on the track, is it? A. Yes, sir.

Q. Does this machine sit on trucks on a flat car?

A. Yes, sir.

Q. What were you doing on the day this man was injured, Mr. Bailey? I will withdraw that question.

A. We were skidding.

Q. Describe to the jury now, how this injury occurred, Mr. Bailey.

A. Well, we were skidding, and they fastened the tongs on to a log and gave the signal.

Q. How did they get the line out to fasten it on to the log? A. Pulled it out.

Q. Describe to the jury how they pulled the line out.

A. Well, they take the line and pull it out into the woods and fasten it on to a log.

Q. How do they pull it out, Mr. Bailey?

A. The men pulled it out.

Q. How did the men station themselves along the line to pull it out? Were they all at the end of the line? Did they all take hold of the end of the line and pull it out?

A. Sometimes, and sometimes they don't.

(Testimony of William Bailey.)

Q. After they get the line pulled out, then what do they do?

A. They fastened the line on to the log and gave me the signal [31] to pull, and I started the log, and pulled it a little ways,—I forget just how far,—and the log started to run in behind a tree, and I saw that it was going behind the tree, and I stopped pulling the log, and the log ran down hill and upset the tree.

Q. Was this machine equipped with any haul-back line? A. No, sir.

Q. Could you see where the log was fastened,—where the line was fastened on to the log?

A. Yes, sir.

Mr. ELDER.—Mark this, please.

(A certain photograph was thereupon marked Plaintiff's Exhibit No. 1.)

Q. Mr. Bailey, I hand you Plaintiff's Exhibit, marked for identification No. 1, and ask you to state if that is a picture of a machine similar to the one which you were operating on that day.

A. Yes, sir.

Q. Do you know whether or not this is the same machine? A. No, sir, it is not.

Q. Is that machine constructed in the same way and equipped in the same way that the machine which you were working on was equipped? A. Yes, sir.

Q. Now, where was Mr. Harkins from the place where they hooked on to this log?

A. He was about halfway, if I remember right, between the loader and where they hooked on.

Q. Do you know why he was in that position?

(Testimony of William Bailey.)

Mr. SWAN.—Just answer that yes or no.

A. What was the question?

Mr. ELDER.—Q. Do you know why he was in that position, why he was in that place? [32]

A. No, I don't know as I do.

Q. Do you know why he was stationed at that point?

Mr. SWAN.—Just a moment. I object to that, if your Honor please, because he has just answered that he does not know.

The COURT.—Well, he may answer it again. Do you understand the question, Mr. Witness?

A. No, I don't.

The COURT.—Read the question to him.

(Last question read.)

A. Well, no, I don't know as I do, unless—

Mr. SWAN.—Just a moment. I object to anything further than that.

Mr. ELDER.—He was there running the machine?

The COURT.—You may ask him the question in a different way. Ask him whether he directed him to—

Mr. ELDER.—Q. Mr. Bailey, were any of the men directed to take a position between the place where you were hooking on to the logs and your loading machine?

Mr. SWAN.—That is objected to as immaterial, unless it is confined to this particular occasion.

Mr. ELDER.—Q. Well, at that particular time?

The COURT.—Overruled.

(Testimony of William Bailey.)

that ground, for the reason that the witness has already stated that they were in sight of this particular instrument, and gave a signal. It does not make any difference how they would do if they were out of sight, because that question is not in this particular case. I cannot see that it is in any way material to the issues.

Mr. ELDER.—If your Honor please, they might have been in sight for that particular log, but the next log they might have been out of sight, and if a man was required to stand in a certain position along that line for the purpose of giving signals, I think we could show that, because he would be required to be there this time the same as any other.

The COURT.—The objection will be overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—Read the question.

(Last question read.)

A. They would have to come down far enough out of the brush so that I could see them.

Q. Mr. Bailey, is there any means or device for controlling a log or for keeping it from running or sliding, on a Marion steam loader?

A. Off the hill? [35]

Q. Yes, sir. A. No, sir.

Q. Now, where were you at the time Mr. Harkins received the injury? A. In the machine.

Q. Who gave you the signal to pull the log?

A. I don't remember.

Q. You say Mr. Harkins was about halfway between where you were with the machine and where

(Testimony of William Bailey.)

they hooked on to the log? A. Yes, sir.

Q. What did you do after you stopped your engine, stopped pulling on the log?

A. Why, I asked the other fellows where Mr. Harkins was.

Q. Could you see him?

A. I saw him just a few minutes before that.

Q. Did you see him at the time you stopped the engine? A. No, sir.

Q. Did you get any signal to go ahead after you stopped? A. Yes, sir.

Q. Did you go ahead? A. No, sir.

Q. Why not?

A. Well, I knew that the tree fell in there somewheres where I saw him last, and I wanted to know where he was.

Q. What did you do?

A. Well, I asked the other fellows where Mr. Harkins was, and they came down off the hill, and I went up, the fireman and I, and found him there in the brush where the tree had hit him.

Q. Had he received injuries? A. Yes, sir.

Q. What was his condition at the time you got there?

Mr. SWAN.—It is admitted here, if your Honor please, that the man died as a result of the injuries that he received at that [36] time. I don't think it is necessary to go into details.

Mr. ELDER.—I don't know that it is admitted.

Mr. SWAN.—We will admit it then.

The COURT.—I understand now that the admis-

(Testimony of William Bailey.)

sion is that he was killed at that time by being struck by this falling tree?

Mr. SWAN.—Yes, your Honor.

Mr. ELDER.—I believe that is all.

Cross-examination.

Mr. SWAN.—Q. Mr. Bailey, you said you were operating that Marion loader for the Potlatch Lumber Company about June, 1910, until the present time? A. Yes, sir.

Q. You had operated Marion loaders in other localities? A. Yes, sir.

Q. For a good many years? A. Yes, sir.

Q. And other similar loaders? A. Yes, sir.

Q. And the Marion loader and other loaders of that similar character and description operated in much the same way, are in general use all over the country, are they not?

A. Yes, sir; especially in the east.

Q. Well, there are quite a number of them used out in this country, or haven't you been around to know?

A. Well, I know of two jobs, is all, in the west here.

Q. Similar to this? A. Yes, sir.

Q. Where were those?

A. Idaho and Washington Northern, and Spirit Lake, Idaho.

Q. There isn't any difference though in the manner of operating the Marion loader from that of various other makes, is there? A. Not very much. [37]

Q. They are all operated on the same principle?

A. Yes, sir.

(Testimony of William Bailey.)

Q. The main difference, if I understand it, is that the Marion loader has a revolving derrick?

A. Yes, sir.

Q. Or boom? A. Yes, sir.

Q. Now, you say you had a five-eighths cable on this machine that morning? A. Yes, sir.

Q. On the drum? A. Yes, sir.

Q. About what was the length of that cable?

A. I don't remember. We was using some two hundred and fifty to five hundred feet.

Q. Between two hundred and fifty and five hundred feet? A. Yes, sir.

Q. That was the extreme length of the cable?

A. Yes, sir.

The COURT.—You mean the cable was five hundred feet long?

A. Well, we used cables from two hundred and fifty to five hundred feet. I don't just remember the length of this particular line.

Mr. SWAN.—Q. It was somewheres between that?

A. Yes, sir.

Q. It would be in the neighborhood of three hundred to three hundred and fifty feet?

A. Yes, possibly four hundred or four hundred and fifty, I don't remember.

Q. How many men were working there on the logs at that time? A. How many men?

Q. Yes. A. Hauling the line out? [38]

Q. Yes. A. Three.

Q. Two besides Mr. Harkins? A. Yes, sir.

Q. How long had you been pulling those logs in in

(Testimony of William Bailey.)

this manner that morning?

A. I don't remember now.

Q. Well, can't you give me any idea as to what the length of time was? Was it an hour or two hours?

A. It must have been an hour or two hours, something like that, I guess.

Q. It might have been longer than that?

A. It might have been.

Q. How long had you been operating the loader at that particular place, how many days or weeks?

A. Well, I don't remember.

Q. Well, was it quite a while?

A. No, I don't think it was. If I remember right, we just commenced there that morning.

Q. You just moved there that morning?

A. Yes, sir.

Q. Now, these logs that you were pulling in by this Marion loader were scattered off in different directions, weren't they? A. Yes, sir.

Q. Kind of stray logs? A. Yes, sir.

A. And you were pulling them in that morning in the same manner that it was customary to do under the same circumstances, weren't you? A. Yes, sir.

Q. And you had been doing the same thing there at the Potlatch Lumber Company—in the woods there for the Potlatch Lumber Company, during all the time that you were operating [39] the loader, for about five or six months? A. No, sir.

Q. About how long had you?

A. I don't just remember how long we was skidding there.

(Testimony of William Bailey.)

Q. Well, was it a couple of months?

A. No, I don't think it was.

Q. Three weeks?

A. I don't know. I don't remember.

Q. Can't you give any idea at all, Mr. Bailey, as to how long you were operating the machine in the same manner it was being operated at the time of the accident?

A. I don't know as I could. I usually did the loading, and I never did very much skidding.

Q. I understood you said you didn't do very much skidding. How long had you been doing that skidding, if that is what you call it,—I mean hauling the logs in from different directions?

The COURT.—How long had you been skidding is the question. Can't you give him some idea how long it was?

A. We had possibly been at it two weeks, as near as I can remember; we might have been at it longer, and it might not have been that long.

Q. It was somewhere in the neighborhood of two weeks? A. Yes, two weeks anyway.

Q. Mr. Harkins was there with your crew all that time, was he not? A. Yes, sir.

Q. He had been working there with your crew for something like four or five months, hadn't he?

A. No, I don't think he was there that long.

Q. Well, three or four months, we will say?

A. I don't think he was there over two months; he might have been, though.

Q. He was there at least two months, and perhaps more?

(Testimony of William Bailey.)

A. Well, he might have been there longer. [40]

Q. Now, on this particular occasion, Mr. Bailey, I suppose that during the two hours or more that you were pulling these logs in, the men would carry the cable out in one direction and hook on to a log, and you would pull it in, and then if there was a log over here in this direction you would do the same thing, and you kept dragging that line out and dragging those logs in in that way? A. Yes, sir.

Q. How far out did they go at this particular time?

A. Well, I don't just remember; it was possibly three hundred or maybe four hundred feet.

Q. Possibly three hundred feet? A. Yes, sir.

Q. Somewhere in the neighborhood of three hundred feet, you think they run that out?

A. It might have been four hundred feet; I don't remember.

Q. You think between three and four hundred feet would be pretty close to it?

A. I think it would.

Q. And I suppose you had to go out that far frequently that morning; in other words, it would simply depend on how far the logs were out, wouldn't it? A. Yes, sir.

Q. And you did that morning the same thing, you went out that far that morning? A. Yes, sir.

Q. Several times, on several occasions?

A. Yes, I think we did.

Q. And now when these men pulled this hook out this particular time and hooked the log on, somebody gave you a signal? A. Yes, sir.

(Testimony of William Bailey.)

Q. And they were in plain view? A. Yes, sir.

Q. You could see them? [41]

A. I could see them, yes, sir.

Q. You don't know whether that was Mr. Harkins or whether it was one of the other men?

A. I don't know; Mr. Harkins wasn't up as far as they were.

Q. He didn't go up as far as they were?

A. No, sir.

Q. Did he start to pull out the hook with these men?

A. I don't remember; I think he did, though.

Q. But he didn't go as far as they did?

A. No, sir.

Q. When he got out some distance what did he do?

A. Well, the last I saw of him he was standing on a log.

Q. Standing on a log?

A. Yes, sir, on a tree that had fallen cross-ways of the—

Q. How far was he at that time from the cable by which you were pulling in this log?

A. Oh, it must have been forty or fifty feet, possible sixty feet.

Q. Off to one side? A. Yes, sir.

Q. How long had he been there?

A. Not very long.

Q. How? A. Two or three minutes, maybe.

Q. How long?

A. Two or three minutes; he might have been there longer than that.

(Testimony of William Bailey.)

Q. He was standing there when you last saw him?

A. Yes, sir.

Q. Prior to the accident? A. Yes, sir.

Q. Was that before or after you had started to pull the log in? A. That was before. **[42]**

Q. After you started to pull the log in you didn't see anything more of him?

A. I looked over to this tree out in the brush, and he was out of sight.

Q. That was before you started to pull the log in, he disappeared from your sight off to one side, say fifty or sixty feet? A. Yes, sir.

Q. And you didn't see anything more of him?

A. No, sir.

Q. Now, I presume, Mr. Bailey, that when you speak of skidding you mean pulling in great big bunches of logs from a way out in the woods, don't you? Is that what you mean by skidding?

A. I never saw them haul in very big bunches.

Q. Well, they run a cable a way out in the woods, clear out of sight, don't they, and hook on to logs with a donkey-engine, that is what you call skidding, isn't it? A. Yes, sir, I think it is.

Q. And frequently, I presume, out there in the woods with this donkey-engine they have side lines that they run off to one side?

A. I think they have. I don't know a thing about a donkey. I think they have; I don't know.

Q. You never have run a donkey-engine?

A. No, sir.

Q. The only thing you have run is these loaders?

(Testimony of William Bailey.)

A. Yes, sir.

Q. I suppose the logs when they are brought in, and the crew of loaders comes down to load them on the cars, there is a big bunch of logs lying right up close to the track, and those are the logs you proceed to load on to the cars?

A. Not in all cases. The donkeys usually load their own logs. **[43]**

Q. When you load with a Marion loader, is that the way you do it?

A. Yes, sir, they are usually hauled in with teams or something of that sort.

Q. Don't they skid them in with a donkey-engine?

A. They load them themselves with it.

Q. But, I say, when you got there this morning, or day after that when you were using this loading machine, the logs would be piled up around it for some distance, wouldn't they, to load them on to the cars? A. Yes, sir.

Q. I suppose that you couldn't get them all in one pile right up close to the track, could you?

A. They usually get them up pretty close.

Q. I suppose that is true, but which would you load first, those right up close to the track?

A. Well, it all depends on whether you have experienced hookers or green men.

Q. Give me an idea of what the customary way was. A. Generally commenced close to the track.

Q. You would load them? A. Yes, sir.

Q. Then you would gradually spread out a little further with your cable and pick up those further

(Testimony of William Bailey.)

away and pull them in? A. Yes, sir.

Q. And, as a matter of fact, you kept that going that way as far out as the cable would reach, wouldn't you? A. Most generally, yes.

Q. And you did that on this occasion?

A. We had on a longer line.

Q. How long had you had this longer line on?

A. From the time we started to work up there.

[44]

Q. For two or three weeks?

A. Possibly two or three weeks.

Q. That ain't what I say; you had a longer line on for two or three weeks than you had used before that? A. Yes, sir.

Q. After you loaded those right close to the track, it was the custom to run these lines out and pick up these other logs any distance they were out to the length of the cable? A. Well, not in all cases.

Q. I am not asking you in all cases. I am asking you what was the general custom?

A. As a general thing we pick them clean as we go along.

Q. And as far out as you could reach with the cable you had you would pull those logs in and load them up on the car, if you needed them to fill up a load, isn't that true? A. Yes, sir.

Q. As a matter of fact, you were doing this work that morning just the same as you had been doing it right along?

A. We were just skidding the logs in. I don't think we were loading them that morning.

(Testimony of William Bailey.)

Q. You hadn't got to the point of loading?

A. No, sir.

Q. You were getting them to the point where you could load them? A. Yes, sir.

Q. You had not loaded any that morning at all, had you?

A. I don't think we did; I don't remember.

Q. As I understood you to say, the different loading machines were operated practically in the same manner?

A. All those with a revolving drum, revolving boom, that is all I know anything about.

Q. You never operated any other except the Marion? A. The Marion and the Barnhart loader.

[45]

Q. And that also had a revolving boom?

A. Yes, sir.

Q. Did you ever see the others in operaton?

A. I never saw them load any with the others, only just a log now and then.

Q. How?

A. Just once in a while a log that happened to be going by.

Q. When you saw those, they were used in the same way in the same manner and used for the same purposes as you used the Marion loaders?

A. You mean the Marion?

Q. No, those others. Didn't you say you had seen others in operation?

A. Well, just once in a while, just seen them loading a log occasionally; I didn't know anything about them.

(Testimony of William Bailey.)

Q. How many kinds are there with the revolving boom,—just the two?

A. Well, there is three that I know of.

Q. Three? A. Three different kinds.

Q. The Marion and the American—

A. And the Barnhart.

Q. Well, they are all operated the same way?

A. Yes, sir.

Q. Used in the same manner and for the same purposes? A. Yes, sir.

Q. In pretty general use all over, aren't they, so far as you know? A. So far as I know. [46]

Q. Now, in these various times that you were doing this work in the same manner and during the past two weeks, pulling these logs in just short distances, you did not have any signal wire on your machine? A. No, sir.

Q. You did not have any haul-back? A. No, sir.

Q. And you were operating it this morning just the same as you had? A. The same, yes.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Mr. Bailey, you never loaded at the same time that you were skidding?

A. Well, sometimes we did and sometimes we didn't.

Q. You were not at this time? A. I think not.

Mr. ELDER.—I offer in evidence Plaintiff's Exhibit No. 1.

Mr. SWAN.—You said that that was practically

(Testimony of William Bailey.)

the same kind of a machine as the one you were operating? A. Yes, sir, the same thing.

Mr. SWAN.—No objections.

Mr. ELDER.—Q. What length of cable did you usually use when you were loading, Mr. Bailey?

A. Different lengths, from one hundred and fifty feet to two hundred and [illegible]y.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. Mr. Bailey, this same cable you used for loading too, didn't you, that you had on there? [47]

A. Yes, sir.

Q. It did not make any difference whether it was longer or shorter, you could load with it just the same?

A. You could, only you didn't have as much power with your machine, that is all.

Q. That is the only difference? A. Yes.

Q. You didn't have any difficulty in loading, just the same, did you? A. No, sir.

Q. Sometimes, you say, you would load when you skidded and sometimes you didn't. I presume that would depend on your own convenience, whether or not the work could be better facilitated in one way or the other; isn't that that fact?

A. Well, as a general thing when we didn't load we were short of cars or something like that.

Q. That is when you would use this machine to pull in the logs instead of loading them right away, and leave them there until the cars came? A. Yes, sir.

(Testimony of William Bailey.)

Q. In other words, it would all depend upon the convenience of doing the work at the time, whether you had cars or anything of that kind; you did not have any set rules about that, did you?

A. No, I don't know as there was.

Mr. SWAN.—I think that is all.

Mr. ELDER.—That is all. **[48]**

[Testimony of Harry Younkin, for Plaintiff.]

HARRY YOUNKIN, a witness duly called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name to the reporter.

A. Harry Younkin.

Q. What is your occupation, Mr. Younkin?

A. Foreman.

Q. For whom? A. Potlatch Lumber Company.

Q. How long have you been working for the Potlatch Lumber Company?

A. Two years the first of last May.

Q. Were you working for the company at the time of the injury to Mr. Harkins, in this case?

A. Yes, sir.

Q. Are you still foreman for the Potlatch Lumber Company? A. Yes, sir.

Q. And you have been working for them ever since the injury in this case? A. Yes, sir.

Q. Are you related either by marriage or blood to the plaintiff in this case? A. Yes, sir.

Q. What relation?

A. She is my mother in law.

(Testimony of Harry Younkin.)

Q. Do you remember when this injury occurred?

A. Yes, sir.

Q. When was it?

A. Two years ago the ninth of this month.

Q. What were you doing at that time, Mr. Younkin? A. What were I doing?

Q. Yes, what was you doing at that time? **[49]**

A. I was foreman.

Q. Of what? A. Of the camp—logging camp.

Q. What were you doing at the camp? What was the camp doing?

A. Skidding logs, cutting logs.

Q. Are you acquainted with the place where this injury occurred?

A. Yes, sir, it happened right close to the camp.

Q. You may describe the position of the machine and the condition of the land and surroundings there to the jury.

A. Well, they were skidding with a log-loading machine this morning. The ground was just a little up-hill; I don't know how steep it was.

Q. How steep would you in your opinion, say it was, Mr. Younkin?

A. Oh, probably eight or ten per cent; maybe not so steep, maybe steeper.

Q. Well, where were they getting the logs from the railroad, or from the machine,—up on the hill?

A. Yes, sir.

Q. How far were they going out that morning after logs?

Mr. SWAN.—You have not shown, Counsel, that

(Testimony of Harry Younkin.)

this man was there that morning.

Mr. ELDER.—Q. Where were you—were you there at any time that morning?

A. I was there before the accident happened; I was there before they spotted the machine.

Q. How long?

A. I probably had gone away from there forty minutes or probably a little longer, to the best of my knowledge.

Q. How far were they going out that morning for logs?

Mr. SWAN.—That is objected to as immaterial.

The COURT.—It is preliminary. He may answer the question.

A. Of course, I couldn't say how far it was. **[50]**

The COURT.—Oh, about how far?

A. Probably three hundred and fifty to four hundred and fifty feet, to the best of my knowledge.

Q. Now, what kind of a machine were you skidding with that morning?

A. Marion steam log loader.

Q. How is that machine equipped?

A. Well, it is a machine that swings around, sits on a truck and swings around on a car either way, and it has a drum in it, what we call a hoisting drum, used for hoisting, and so on.

Q. It is run by steam? A. Yes, sir.

Q. What size cable did it have on it at this time?

A. Five-eighths.

Q. Was this machine equipped with a haul-back line? A. No, sir.

(Testimony of Harry Younkin.)

Q. Was it equipped with a whistle-cord, or a whistle-line? A. No, sir.

Q. Was it equipped with any signal device?

A. Nothing only giving signals by hand, that is, in skidding.

Q. How did you get the line up to where the logs were, Mr. Younkin?

A. There was only one way to get it out, and that was to pull it out by hand with men.

Q. Were they doing that that morning?

A. Yes, sir.

Q. Will you state to the jury what your instructions were with regard to pulling the line out, how they pulled it out? State what positions they took when they pulled it out.

A. That depended on the men they had. There were three of these this morning. **[51]**

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, unless it is shown by this witness that he gave instructions at this particular time.

The COURT.—Well, I assume that you are now asking for instructions to these particular men.

Mr. ELDER.—Yes, your Honor.

Mr. SWAN.—Oh, all right.

The COURT.—You will understand, Mr. Younkin, that the question seeks information as to the instructions you gave to those particular men?

A. Well, we had no cars to load, and I gave these men instructions to move their jammer down there and skid off to the hill back of the camp, which they

(Testimony of Harry Younkin.)

did. I told them that there were only three men, and they would have to take the cable out themselves.

Q. When there were only three men, what was—how did they take the cable out? Did they all go from the end of it?

A. No, sir; they generally would divide up equally; it depended on the distance they were going, probably fifty or one hundred feet apart.

Q. Were the men required to station themselves in any particular place for the purpose of giving signals?

Mr. SWAN.—I object, if your Honor please, as leading and suggestive. I think we should have what the instructions were.

The COURT.—Overruled. Answer the question.

A. Yes, they would have to—if they couldn't see the engineer, they would have to get apart so they could see to give signals.

Q. Were they required to do that by you and the company, in order to give signals?

A. Yes, sir; I told them this morning that they would have to get apart. Of course, a couple of them had skidded before.

Q. What duties was Mr. Harkins employed for? [52]

A. Top loader.

Q. What are the duties of a top loader?

A. That is loading logs on cars.

Q. Where does he work?

A. He works on top, takes the logs out and builds the load.

(Testimony of Harry Younkin.)

Q. You mean, he places the logs on top of the cars?

A. No, the engineer does that, but he is up there to take the logs up and build the load. The engineer is supposed to put the logs where he wants them.

Q. Was Mr. Harkins employed about your camp prior to the time he was put on here as top loader?

A. Yes, sir.

Q. What was he employed for?

A. Well, sir, at the time that I went up in there and I took this camp, he was employed there as a carpenter in building a barn and fixing up tents around the camp, or camping ground there.

Q. Did you give Mr. Harkins any instructions on this morning of the ninth regarding what he should do?

A. Yes, sir; I told him he would have to go out and skid.

Q. Why did you have him skid?

Mr. SWAN.—I object to that as immaterial. If he told him, that is sufficient.

The COURT.—Yes, I think so.

Mr. ELDER.—Q. How long had you known Mr. Harkins, Mr. Younkin?

A. About twenty years.

Q. What was his occupation?

A. Well, sir, he was a millman, in business at one time for himself, and laid around in the summer. I understand that he used to file saws.

Q. Well, was he ever a scaler?

A. Yes, sir, he scaled for the Idaho-Washington Northern [53] Railway Company.

(Testimony of Harry Younkin.)

Q. How long did you say you had known him?

A. About twenty years.

Q. During that time had Mr. Harkins ever worked around a Marion loader, to your knowledge?

A. Not to the best of my knowledge, outside of scaling.

Q. How long have you been engaged in logging operations, Mr. Younkin?

A. About twelve years.

Q. How long have you been acquainted with the Marion steam loader, and loaders of its class and type? A. About twelve years.

Q. With what company?

A. Well, I have worked for the Idaho and Washington Northern, worked for different companies in the east, Cherry River Boom & Lumber Company, Central Pennsylvania Lumber Company.

Q. While you was working for the Potlatch Lumber Company did you have charge of any skidding machine of the type which were equipped with haul-back line and signal wire?

A. Yes, sir, I had one.

Q. You may describe to the jury what the use of a haul-back line is.

Mr. SWAN.—Just a minute. I object to it as incompetent, irrelevant and immaterial, if your Honor please, and it doesn't tend to prove any negligence, or any fact upon which negligence could be based in this action. It is concluded here that the Marion steam loaders didn't have a haul-back line, and how another machine is equipped with a haul-back line

(Testimony of Harry Younkin.)

can't, to my notion, be in any way material in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception. [54]

The COURT.—Answer the question.

A. Of course, a haul-back line is supposed to take it out around a piece of timber and bring it back; connected on to the main line, which is supposed to take the main line out in the woods.

Q. Is there any other use for it, Mr. Younkin?

A. Yes, I think it has a tendency to hold the logs. They all come down one road generally with a donkey.

Q. Describe to the jury how a machine of that character and type is operated.

A. It is operated by steam, with two drums.

Q. How are the lines fastened? You say they run around in the woods. Are they fastened in any way?

A. They are hung up in blocks, whenever they think it is necessary to hang them up to keep them off the rock and ground and so on and brought down to the main line and put on to a chain there. The main line and the haul-back line are both connected on to this chain, and from this a choker is hooked on the logs and hooked on to this chain.

Q. Are the engines equipped with any machinery such as *brak* brakes? A. Yes, sir.

Q. What is the use of the brake?

Mr. SWAN.—The same objection, if the Court please.

The COURT.—Overruled.

(Testimony of Harry Younkin.)

Mr. SWAN.—An exception.

A. A brake is to hold the drum. For instance, you throw out slack and want to stop the drum, you put on the brake.

Q. If you would use that brake, can you stop your main line and hold a log which would be fastened on to that line, with your haul-back line?

A. Well, that would depend on what size log it was. You could either hold the log or break your line.

Q. What size line is used as a haul-back line on those [55] machines, skidding machines?

A. Well, from half inch to five-eighths. On small donkeys I believe they have half-inch, and the large ones five-eighths.

Q. The line you were using on the Marion loader for skidding purposes was five-eighths, was it?

A. Yes, sir.

Q. Are these lines on the other machines of the same type and class as that line?

A. I presume they are, to the best of my knowledge.

Q. Then you say you could either hold—do you know the size of the log which they had hooked on to this line that morning? Do you remember seeing that log?

A. Yes, sir, I see the log, but I don't remember how big it was—probably sixteen or eighteen inches top and—

Q. And how long was it?

A. I presume probably thirty-two feet.

Q. Now, if this was hooked on to a log of that

(Testimony of Harry Younkin.)

character, the main line, could you stop that log and your main cable with your haul-back line?

Mr. SWAN.—If the Court please, I object to that as calling for a conclusion of the witness, and speculative, merely, and incompetent, irrelevant and immaterial. This man wasn't there at the time this accident happened, and he said he had been away from there nearly an hour. What could have been done under such conditions, in his opinion, seems to me to be utterly immaterial in this case.

The COURT.—Objections the same.

Mr. ELDER.—Q. Mr. Younkin, if this Marion steam loader had been equipped with a haul-back line, or if the company had been using the kind of a machine which is usually used for the purpose of skidding, could this 32 foot log have been stopped by the engineer?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and [56] it is not based upon any facts introduced here in evidence.

The COURT.—I think I will let him answer that.

Mr. SWAN.—An exception.

The WITNESS.—What was the question?

(The last question read.)

A. I presume it could, either that or break the line.

Q. Do you know whether or not the Marion steam loader and loaders of that class are generally or commonly used by logging companies for the purpose of skidding logs in this community?

A. Not to the best of my knowledge.

(Testimony of Harry Younkin.)

Q. Now, Mr. Younkin, if this machine, this Marion steam loader, had been equipped with a signal device such as a whistle-cord, would it have been necessary to station anyone between the places where you were hooking on to the log and the engine for the purpose of giving signals?

Mr. SWAN.—I object to that as incompetent, irrelevant, and immaterial, and for the further reason that there is no evidence here at all, if the Court please, that this man was stationed there by the direction of anybody, no evidence here to show why he was there. In fact, it is shown by the only testimony on the subject that he had nothing to do there, and it seems to me that whether or not it would be necessary to place a man in this position or that position under such circumstances is in no way material to the issues in this case.

The COURT.—I think I shall sustain this objection, at least until it is more definitely shown what the duties of this man were, and why he was there, and whether it was necessary for him to be there.

Mr. ELDER.—Q. Mr. Younkin, did the company require the men who were hauling out the cable from this Marion steam loader to station themselves between the place where the engine was located and the place where they were hooking on to the logs, for the purpose of giving signals? **[57]**

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, and for the reason that the testimony shows that this man was out fifty or sixty feet to one side of the line, where he had no

(Testimony of Harry Younkin.)

occasion to be, and in plain view of the engineer at that time.

The COURT.—Overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—Read the question.

(Last question read.)

A. Certainly. There was no other way to give signals, only that way, to be stationed along the line, unless it was clear, that the engineer could see from the engine to the log, if there was no brush. If there was brush they had to be stationed there in order to give the signals, or somewhere in sight.

Q. Isn't it a fact, Mr. Younkin, that in carrying out—

The COURT.—Don't lead the witness.

Mr. ELDER.—Q. Well, Mr. Younkin, state how the men carried out the haul-back line,—I mean the main line on this machine, the Marion loader.

Mr. SWAN.—He has already answered that.

Mr. ELDER.—I don't think I asked this witness.

The COURT.—Well, let him answer again.

A. Well, they get a reasonable distance apart, so that each man has his share of cable to take; it depends on how far they are going out.

Q. Well, if they were going out four hundred and fifty feet, how far apart would they get?

A. They would be a reasonable distance apart, probably fifty or one hundred feet apart, so that each man would take his share of the weight.

Q. What were the instructions to the men? What were their duties after they got the line out?

(Testimony of Harry Younkin.)

A. It was the duty of one of them to fasten it on to the log. [58]

Q. What were the duties of the others?

A. The duties of the others was, when they were ready, to give signals.

Q. Where would they stand?

A. If they couldn't see one another from where they were they would have to go where they could see the engineer and see one another.

Q. Were they required to stand close to the line?

A. No, sir, they were not. I gave those men all instructions to get a reasonable distance from the line in skidding.

Q. Did you give them any instructions as to what was a reasonable distance?

A. No, sir, I did not. I supposed they should know that.

Q. Now, Mr. Younkin, you may state from your experience and knowledge of logging and these machines, if this Marion steam loader had been equipped with a haul-back line, or if this company had been using a machine which is commonly and usually used for skidding purposes, if the engineer could have stopped this 32-foot log with this haul-back line and the brakes on his engine?

Mr. SWAN.—I object to that as incompetent, irrelevant, and immaterial, calling for an opinion of the witness, and on the further ground that it has been shown conclusively that the Marion steam loader is never equipped with a haul-back line under any conditions or circumstances, and it was not necessary.

(Testimony of Harry Younkin.)

The COURT.—The objection is sustained on the ground that the same question has already been answered.

Mr. ELDER.—I thought you sustained the objection, your Honor, to the other question.

The COURT.—No. The objection I sustained was to the signal-cord, that is, you asked this question before, which was permitted to be answered.

Mr. ELDER.—Yes, I beg your pardon, I remember now. [59]

Q. Mr. Younkin, if this engine had been equipped with a whistle-cord for signalling device such as is commonly used on skidding machines, would it have been necessary to station a man for the purpose of giving signals between the point where they hooked on to the log and the engine?

Mr. SWAN.—That is objected to as repetition and incompetent, irrelevant, and immaterial, and for the further reason that it does not appear from the evidence that this man was in any position such as he describes.

Mr. ELDER.—The evidence shows that he was about halfway.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. No, it wouldn't be necessary.

Mr. ELDER.—Q. On the machine equipped with a whistle-cord how is the signal operated?

A. On a donkey, you mean?

Q. Yes, or on a machine equipped with—

A. There is a whistle wire stretched from the

(Testimony of Harry Younkin.)

donkey back into the woods.

Q. Who operates the wire?

A. The whistle-boy.

Q. How does he operate it?

A. He operates it through a hook-tender or rigging slingers.

Q. Do you mean, Mr. Younkin, that they tell him when to give the signals and what signals to give?

A. Yes, sir.

Q. How does he signal, how does he give the signal?

A. That depends on what signals they want.

Q. Well, any signal. How does he operate the signals in sight?

A. He hits the wire, if they want one whistle, he hits the wire once, and if they want two, he hits the wire twice.

Q. Where is he placed with reference to where they are getting the logs?

A. That depends on the location of where they are skidding from. [60]

Q. Do they place him in the immediate vicinity of where they are getting the logs?

A. They place him out in the woods a certain distance away from the line.

Q. Does he have to be where he can see them getting the logs?

A. No, sir, he does not have to be where he can see them; he has to be within hearing distance of either the hook-tender or rigging slingers.

Q. Where a machine is equipped with a haul-back

(Testimony of Harry Younkin.)

line and a whistle-cord, where does the whistle-boy stand, and where is his position with reference to this line? A. Well, it is out to one side of the line.

Q. Did I ask you if this Marion steam loader was commonly or generally used by—

A. I don't remember whether you did or not.

Q. By logging companies in this community?

The COURT.—I don't think that in itself would be a criterion. The question is whether it is commonly used by logging companies, unless there is some distinction in conditions here in one country as another.

Mr. ELDER.—Q. You may state, Mr. Younkin, whether or not the Marion steam loader, or loaders of the same character and kind as that, are generally used by lumbering companies in their operations for the purpose of skidding logs.

A. Not where I have worked elsewhere, to the best of my knowledge.

Q. When loading logs, Mr. Younkin, how far do the companies usually go with a loader for the logs?

A. That depends; most companies that I have worked for went from sixty to seventy-five feet.

Q. Do you know of any company, or whether or not the companies generally operating in logging have any limit to the distance that they go for skidding logs? [61] A. Some companies do.

Q. I mean for loading logs?

A. Some companies do.

Q. What is the distance?

Mr. SWAN.—I object to that as immaterial and

(Testimony of Harry Younkin.)

incompetent and irrelevant.

The COURT.—I think it is objectionable, unless you can show a general custom. The mere fact that one company or two companies may limit the distance would not be a criterion or a measure of that which is careful and that which is careless.

Mr. ELDER.—Q. You may state, from your knowledge, Mr. Younkin, and from your experience, whether or not companies generally have a limit on which they will go for logs for loading purposes with machines such as the Marion steam loader.

The COURT.—Just answer yes or no.

A. I did not understand the question.

Mr. ELDER.—Read the question.

(Last question read.)

A. Yes, sir.

Q. What is that distance?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, no proper basis laid for the question.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Sixty to seventy-five feet.

Mr. ELDER.—I believe that is all.

Cross-examination.

(By Mr. SWAN.)

Q. I understood your last answer to the effect that you think the limit they would go out when loading logs would be from sixty to seventy-five feet. That is what you said, wasn't it?

A. From sixty to seventy-five feet in loading logs.

(Testimony of Harry Younkin.)

Q. That is when you are loading logs? [62]

A. Yes, sir.

Q. On this particular day, you were not loading logs, were you? A. No, sir.

Q. You had not been at all that morning?

A. Not to the best of my knowledge.

Q. How long, Mr. Younkin, had you been working as a foreman for the Potlatch Lumber Company at this time? A. From the first of May.

Q. From the first of May? A. Yes, sir.

Q. During that time you had been in charge of this same camp, or had you been at another camp?

A. I had been in charge of loading logs.

Q. At this particular camp?

A. No, sir, all along the line.

Q. Did you go from one camp to another?

A. We was loading on the main line of the W. I. & N., and branches off the main line.

Q. In other words, you had charge of the Marion loader, and you were also in charge of a loading crew? A. Yes, sir.

Q. It was your purpose, or the main duty that your crew had was to go from place to place and load logs with this Marion loader? A. Yes, sir.

Q. You had been doing that, I presume, for several months?

A. Well, from the first of May up till October, if I remember right.

Q. Now, how long had Mr. Harkins been working for you prior to the accident?

A. I just forget when he first came to work for me;

(Testimony of Harry Younkin.)

I [63] think it was in July.

Q. Give me an idea. Four or five months?

A. I should say just about four or five months.

Q. About four or five months? A. Yes, sir.

Q. And he, I presume, went around with your crew from one camp to another, as it was necessary for you to do the work? A. Yes, sir.

Q. He was with you during all that time on the loader? A. No, sir, not on the loader.

Q. Where was he? Was he away from the loader all the time?

A. Well, part of the time he were and part of the time he weren't.

Q. What was he doing when he was away from the loader?

A. The first month or so he worked around.

Q. Then what did you put him at?

A. Then I put him at building a barn and fixing up camps.

Q. Then what did you put him at?

A. Then I put him on to this loader as top loader.

Q. He had been there how long?

A. Top loading?

Q. Right there with the loader; yes, sir.

A. I should judge, when I changed him from the camp to that he had been there about two weeks or such a matter, I don't just remember.

Q. How long have you been in the logging business?

A. Well, I have worked in the logging woods around different places, logging, about twelve years.

(Testimony of Harry Younkin.)

Q. Where did you work before you went to the Potlatch Lumber Company?

A. Idaho and Washington Northern. [64]

Q. That was the Blackwell Lumber Company, was it?

A. I worked for the railroad company on those jammers they had over there loading logs for the Panhandle Lumber Company.

Q. Near Spirit Lake? A. Yes, sir.

Q. How long did you work there?

A. Well, sir, about two years, a little over.

Q. Were you operating a Marion loader at that time?

A. I was working outside at that time, top loading.

Q. You were on a Marion loader, weren't you?

A. Yes, sir.

Q. And had about two years' experience with a Marion loader there before you went to the Potlatch Lumber Company? A. Yes, sir.

Q. The Marion loader you had there was just like the one you were using at the time of this accident?

A. I think so.

Q. Operated in the same manner? A. Yes, sir.

Q. Had no signal cord? A. No, sir.

Q. You had no haul-back line? A. No, sir.

Q. Did you ever see a Marion loader or any other loaders similar to that that were equipped with a haul-back line or signal cord?

A. I never see any on a Marion loader.

Q. There wasn't any facilities for doing it, was there? A. No, sir, not for loading logs.

(Testimony of Harry Younkin.)

Q. When you were up there on the I. W. & N., I presume you loaded these logs in the same manner that you were doing at the time of the accident?

A. We were not loading no logs at the time of the accident. **[65]**

Q. I mean prior to the time of the accident, when you were loading, you did the work the same way?

A. Yes, sir.

Q. And these logs, I suppose some of them, quite a bunch of them, would be right up alongside of the track where you could get them handily and run them up on the car?

A. That is—what do you mean—at the Idaho?

Q. Yes.

A. Yes, there would be logs dragged sixty or seventy-five feet.

Q. And after you loaded those right close, you would run your line out a distance of sixty or seventy-five feet? A. Yes, sir.

Q. To get the other logs? A. Yes, sir.

Q. And you would do that around in all directions?

A. They were all skidded right in along the track. There was none supposed to be back over seventy-five feet.

Q. Suppose there was some back over seventy-five feet, would you leave them there?

A. Yes, sir.

Q. You wouldn't touch those? A. No, sir.

Q. You run this hook out, though, without a haul-back for that distance? A. Yes, sir.

Q. And also without a signal line?

(Testimony of Harry Younkin.)

A. Yes, sir.

Q. And aside from the fact that you didn't run it quite so far when you were up on the I. W. N. as you did down here on this occasion, the work was done in exactly the same manner, was it not?

A. Yes, sir. **[66]**

Q. Now, how much of the cable, did you have on the drum up there on the I. W. N?

A. I think one hundred and twenty-five feet, to the best of my knowledge.

Q. If you only run out sixty or seventy-five feet, why did you have so much cable?

A. When you go out there sixty or seventy-five feet, you have extra cable to pull in a bunch of them, put the cable around a bunch and drag them in, to save making so many trips.

Q. You would skid them in up close to the track and then load them from that place? A. Yes, sir.

Q. Now, at the time of the accident, Mr. Younkin, you didn't have any cars there I believe?

A. No, sir.

Q. How long was it since you had had any cars in that place?

A. If I remember right, we loaded the day before.

Q. And the cars were run out?

A. Yes, the engine come in that night and took them out.

Q. And there hadn't any more come in?

A. No, sir.

Q. The day before that did you have occasion to run the cable out any distance at all?

(Testimony of Harry Younkin.)

A. No, sir; if I remember right, we was loading right where the teams was skidding the day before.

Q. And you loaded all those logs?

A. I don't know whether we loaded them all; we loaded all the cars we had.

Q. Then the next morning you were waiting for some cars, and you told the men to skid these logs in?

A. Yes, sir. **[67]**

Q. Did you tell them how far they were to go out and skid the logs?

A. No, sir. All I told them was to go the full length of the cable.

Q. You told them to go the full length of the cable that morning?

A. Yes, we had this timber felled all up around the hill there, and it was all supposed to come out.

Q. Who did you give that instruction to?

A. To Mr. Harkins.

Q. To Mr. Harkins?

A. To all three of them; they were all three standing there.

Q. They were all there, and you told them all to skid these logs in, and they could go out as far as the end of the cable?

A. Yes, sir; I told them the logs all had to come in and they could go the whole length of the cable.

Q. And of course you wouldn't have done that if you had anticipated that there was any danger in going out that distance, would you? A. No, sir.

Q. As a matter of fact, when you gave instructions to these men to go out there, you thought it

(Testimony of Harry Younkin.)

was perfectly safe to go out and skid those logs in without a haul-back line just as far as the cable would reach?

Mr. ELDER.—I object to that as immaterial and not proper cross-examination.

Mr. SWAN.—This man, if your Honor please, was in charge there and he had been twelve years in this kind of work and he gave these men these directions to go *you* and do this work. Now, it seems to me that I have a right to show by him what the dangers were, if any. [68]

The COURT.—Overruled.

Mr. SWAN.—Read the question.

(Last question read.)

A. I thought it was to the best of my knowledge.

Q. You were basing that knowledge, weren't you, on twelve years' experience?

A. In fact, I never gave it a thought, whether there would be any danger or not; I didn't suppose there was.

Q. If you had anticipated that there would be any danger, you wouldn't have ordered the men to go out there, would you?

Mr. ELDER.—I object.

The COURT.—Sustained.

Mr. SWAN.—Q. Now, the only difference and the only greater danger there would be, would be the fact that the log would have to be pulled that greater distance, wouldn't it? The work is done the same way, whether you go out seventy-five feet or two hundred and fifty feet?

(Testimony of Harry Younkin.)

A. It generally is, yes, sir.

Q. And the only difference in the danger would be the fact that the log had to be pulled that much further? A. Yes, sir.

Q. I suppose up in the woods, Mr. Younkin, that the ground is uneven?

A. Certainly it is in all woods.

Q. It is rolling and hilly, and you have got to skid these logs along the ground as you find it, haven't you?

Mr. ELDER.—I can't see where that has any effect on this case.

Mr. SWAN.—You were describing the conditions up there.

The COURT.—Well, he may answer the question.

The WITNESS.—What is the question?

Mr. SWAN.—Read him the question.

(Last question read.) **[69]**

A. Certainly, you have got to get the logs.

Q. Now, in pulling this cable up, I suppose the men would place themselves along that cable in any position they considered was the best, to get the cable out there?

A. Yes, certainly; they couldn't all three, if they was going out five hundred feet, they couldn't all three take hold of the end of it.

Q. I am asking you. I never did that kind of work. That is the reason I am asking you. When they would get that out there, if one man happened to be at the end and the others back further, the others wouldn't go out there—they would stand there and

(Testimony of Harry Younkin.)

wait for the other man to hook the cable on?

A. They couldn't *stand they* were when they pulled the line out. The chances are the log would come down that way. They would have to walk to one side or the other a reasonable distance.

Q. They would go a reasonable distance?

A. Yes, sir.

Q. They would pull the line in and the men would walk back behind the line and drag it out again?

A. Yes, sir.

Q. It was not customary at all for the engineer to start that line until he got a signal from one of the men? A. No, sir.

Q. And if the man at the end of the line was in plain sight of him, when he hooked that line on to the log, there wouldn't be any occasion for anybody else giving him a signal, would there?

A. No, sir.

Q. The man who hooked the cable on to the log would be the natural person to give the signal, and to know when it was time to give the signal?

A. Why, yes, he would be supposed to know. I suppose that **[70]** all three took their turns that morning; they generally do.

Q. They took turn and turn about?

A. Yes, sir.

Q. That is what they had been doing before that, that was the custom? A. Yes, sir.

Q. Now, whether or not a man was required to give a signal part way out, in any event, when the cable got out as far as they wanted to drag it he

(Testimony of Harry Younkin.)

would step to one side in order to get out of the way of the log?

A. Yes, sir, or wait until he got the signal from the other man that fastened on to the log, either one; it would depend on whether it was—

Q. And when he went off to one side he would do that in order to get out of the way of the log as it was pulled in? A. He was supposed to; yes, sir.

Q. And the distance he would go and the direction he would go and the position in which he would stand would depend a good deal on his own judgment, wouldn't it? A. I presume so.

Q. And if he thought that he wasn't far enough, or any of them weren't, that they weren't far enough away, they could go farther?

A. They could go further, certainly.

Q. In other words, Mr. Younkin, you didn't have any fixed and set rules as to how far a man should go out in order to be safe? A. No, sir.

Q. A man had to use his own judgment, the same as he does in every other kind of business, wouldn't he? A. I presume he would.

Q. Have you ever used any other loading machine, except the Marion? [71]

A. The Barnhart, built by the same people as the Marion; in fact, they are called the Marion now.

Q. Did you ever work on any others?

A. Nothing, only the Barnhart and the Marion.

Q. Did you ever see any others in operation?

A. Yes, sir.

Q. Where?

(Testimony of Harry Younkin.)

A. Well, about the only others I saw in operation was a Slide McGifford for the Potlatch Lumber Company.

Q. For the Potlatch Lumber Company?

A. Yes, sir.

Q. Then the only machines of that character that you have seen are this Marion loader that you were using at the time of the accident, and the Barnhart, which you were using—was using up at Spirit Lake?

A. No, sir, it was a Marion we was using at Spirit Lake.

Q. Where were you using the Barnhart?

A. In the east.

Q. Was that the only one you used in the east?

A. No, one company I worked for there had six.

Q. They were operated about the same as this?

A. Just about the same, apparently.

Q. And I suppose they used those back there pulling in logs for short distances, the same as they did here?

A. Yes, sir; seventy-five feet was supposed to be the limit.

Q. How much of a cable did they have there?

A. About one hundred and twenty-five feet.

Q. I suppose, though, you didn't have to take actual measurement how far you went out with a cable; if you thought you were seventy-six feet, you wouldn't stop, would you?

A. No, the foreman was generally supposed to step it off or measure it off and not allow the loading crews to go beyond that. [72]

(Testimony of Harry Younkin.)

years, isn't that the natural way you would do business, and isn't that the customary way of doing business?

A. I don't know whether it is customary but that is the way a man would do.

Q. That is the way you have always seen it done, isn't it? [74]

A. Certainly. A man that is foreman is supposed to get the logs as cheap as he can.

Q. And it wouldn't be practicable, would it, if you had two logs over here and two over here in this direction, and two over here, to take the time to run a haul-back line for this log and then take the time to run a haul-back line for this log, and then take the time to run a haul-back line for this log over here, it wouldn't be practicable, would it?

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—Of course, it isn't in evidence here yet that such a condition existed out there, but I can't anticipate what the showing will be on that point. He may answer.

Mr. SWAN.—Q. State, Mr. Younkin, whether it would be practicable to do that.

A. Yes, I think it would.

Q. It would be practicable to do what,—change the haul-back line?

A. No, not for one or two logs.

Q. That is what I am asking you. Would that be practicable?

(Testimony of Harry Younkin.)

Q. Did you ever see it done?

A. Not to the best of my knowledge.

Q. Now, as a matter of fact, isn't it true, Mr. Younkin, that at the time you instructed these men to pull these logs in here these distances, the logs were scattered in various directions?

Mr. ELDER.—I object to that.

A. Yes, the timber was felled on the sidehill, and from the branch clean down to the camp.

Q. They would run it out in one direction and swing the boom and run it up another way; isn't that the fact?

A. They were skidding right close to the camp, skidding off the sidehill.

Q. Isn't that the way they did it? **[75]**

A. Yes, sir.

Q. As a matter of fact, they were doing that work there that morning in the most practicable and customary and usual manner under the circumstances; isn't that true?

The COURT.—Isn't that very leading, Mr. Swan?

Mr. SWAN.—This is cross-examination, if your Honor please.

The COURT.—I will not permit either side to ask the witness leading questions. His relations to both sides are such that I think he should not be lead.

Mr. SWAN.—An exception.

Mr. SWAN.—I think that is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Mr. Younkin, did you have any instructions

(Testimony of Harry Younkin.)

from the superintendent or the man over you in this company, regarding the distance which you should go when this machine was skidding logs?

A. No, sir, when I ordered cable for the machine, they sent up five hundred feet, if I remember right.

Q. Did you have any instructions when you was skidding logs with the regular skidding machine regarding leaving logs at any distance from the track when skidding with this machine?

Mr. SWAN.—Just a moment. This man states that he never operated a skidding machine here, that he operated nothing but this loader.

The COURT.—What is the fact, Mr. Younkin?

Mr. ELDER.—Did you have a regular skidding machine there?

A. Yes, sir, I had a slide, a small donkey.

Q. Was it equipped with a haul-back and signal device. A. Yes, sir.

Q. Could that machine have been used in bringing in this timber on this sidehill by putting out your lines there?

A. I presume it could, yes; that is, there was timber there all around it. **[76]**

Q. This timber on this sidehill wasn't a scattering log here and there, was it? Wasn't it pretty heavily timbered?

The COURT.—Ask him how the logs lay there on that hill.

A. Well, there was a piece of ground there,—I don't just remember,—I don't know how much timber was on this sidehill.

(Testimony of Harry Younkin.)

The COURT.—By timber, do you mean logs?

A. Yes, timber that was felled and made into logs there; there had never been no other logs taken away. In some places it was pretty thick, and in some places not so thick.

Q. Did you have any instructions regarding how much of that timber should be hauled in with the Marion loader, from your company?

A. No, sir; I was supposed to use my own judgment in that.

Q. You said that you would take the haul-back line out and bring in a log if you only had one or two. I wish you would explain to the jury what you meant by that.

A. It is just that if you had a donkey sitting here, and you cleaned up, with your donkey sitting there, and you only had one or two logs laying around back here, you would catch them with your haul-back line, if your haul-back line was sufficient to pull them in, and the logs were so you could.

Q. Why would you do that?

A. Because you wouldn't want to pull your haul-back line out and bring it around for one or two or three logs.

Q. Why wouldn't you take your main line?

A. Because the main line on a donkey is too heavy to pull out.

The COURT.—That is, you mean it is too heavy to pull out by hand?

A. Yes, an inch and an inch and an eighth and an inch and a quarter cable.

(Testimony of Harry Younkin.)

Mr. ELDER.—That is all.

Recross-examination. **[77]**

(By Mr. SWAN.)

Q. Would you pull the haul-back out by hand just the same as you would pull the cable out on the Marion loader?

A. Certainly, you would have no other way.

Q. You said you were supposed to use your own judgment in these matters? A. Yes, sir.

Q. And you did use your own judgment in these matters? A. Yes, sir.

Q. And your best judgment?

A. Yes, sir, to the best of my knowledge.

Q. Where was this slide machine you speak of, that morning?

A. The slide was just below where the jammer was skidding.

Q. Did you have it there at the camp with you?

A. The slide?

Q. Yes.

A. No, sir, it was sitting off at the lower side of the creek, off the cars; the slide works on the ground.

Q. Was it right there?

A. No, sir, it wasn't right there.

Q. How far away was it from where you were operating the Marion loader at the time?

A. I don't know just how far it was; it probably was a thousand or fifteen hundred feet down the track, off on the opposite of the track, getting timber from the other side.

(Testimony of Harry Younkin.)

Q. You could have used that if you had thought it advisable?

A. I could have used that if I had had it up there.

Q. That morning? A. Yes, sir.

Q. And you didn't think the use of the Marion loader was any more dangerous under the circumstances than if you had used the slide? **[78]**

Mr. ELDER.—I object to that.

The COURT.—That is leading.

Mr. SWAN.—I thought I could go quite a little ways on cross-examination of the witness.

The COURT.—It depends on the relation of the witness to the parties.

Mr. SWAN.—Exception; I believe that is all.

Mr. ELDER.—That is all. **[79]**

[Testimony of Thompson R. Manning, for Plaintiff.]

THOMPSON R. MANNING, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name to the reporter.

A. Thompson R. Manning.

Q. Where do you reside?

A. I reside at Coeur d'Alene at present.

Q. What is your occupation? A. Engineer.

Q. Did you ever have any experience with running what is known as a donkey-engine, or a skidding machine, where a haul-back line and whistle device are used on the machine? A. I have.

Q. How many year's experience?

(Testimony of Thompson R. Manning.)

what would happen, isn't it?

A. Yes, but if the dogs are driven into the log you can hold your log or break your tackle.

Q. You have to drive it into the rear end of the log?

A. No; as a general thing you use what you call a dog, and it is driven from the front end of the log.

Q. Then it resolves itself into a proposition of how the line is fastened into the log?

A. Yes, sir, that is it.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all. [82]

[Testimony of George Westfall, for Plaintiff.]

GEORGE WESTFALL, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. George Westfall.

Q. Where do you reside, Mr. Westfall?

A. I have been at Bovill for the last two weeks.

Q. What is your employment, what is your occupation?

A. Well, I generally hook tongs or run a Marion. That is what I have followed for the last eight years.

Q. Where have you run the Marion? Where have you had experience with the Marion steam loader?

A. I run it for the Potlatch Lumber Company, and I run it for the I. W. N.

(Testimony of George Westfall.)

Q. Where else have you had experience with the Marion loader?

A. I never had any only with those two places.

Q. Did you ever work around where they were used?

A. In only those two places. I have other machines though, the Barnhart.

Q. Have you worked with machines of the same type as the Marion steam loader at other places?

A. The Model Ten is all.

Q. Is it of the same character and general type as the Marion steam loader? A. Yes, sir.

Q. Where you have worked with that?

A. I have worked for the Laurel River Lumber Co.

Q. Where else?

A. Lynchville, at Lynchville, West Virginia. I worked in Burner, West Virginia, for the Burner Lumber Co. [83]

Q. Any other place? A. No, sir, that is all.

Q. In your eight years' experience, Mr. Westfall, do you know, or can you state, whether or not the steam loader is generally used by logging companies for the purpose of skidding logs?

Mr. SWAN.—I object to that upon the ground that he hasn't shown himself qualified, and on the further ground that the question is objectionable unless counsel embodies in it all the facts and circumstances that existed at the time of this accident.

The COURT.—Overruled.

Mr. SWAN.—An exception.

(Testimony of George Westfall.)

Mr. ELDER.—Read the question.

(Last question read.)

A. No, sir, only the Potlatch.

Q. Only the Potlatch company, did you say?

A. That is the only place I ever skidded with them or worked around them where they were skidded.

Q. Will you state, Mr. Westfall, from your experience and knowledge of the general operation of the Marion steam loaders by different logging companies whether or not they generally have a limit on which they will go for logs for the purpose of loading.

Mr. SWAN.—That is objected to, as incompetent, irrelevant and immaterial.

Q. From the track or machine?

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question.

A. Yes, sir.

Mr. ELDER.—How far?

A. Seventy-five feet.

Mr. ELDER.—That is all. [84]

Cross-examination.

(By Mr. SWAN.)

Q. They do haul in logs quite frequently at the various places you have worked a distance of seventy-five feet? A. Sir?

Mr. SWAN.—Read the question.

(Last question read.)

A. Yes, sir.

Q. They do that by the Marion steam loader, with the Marion steam loader? A. Yes, sir.

(Testimony of George Westfall.)

Q. They do it with other loaders of a similar nature? A. Sir?

Q. They do it with other loaders of a similar nature? A. Yes, sir.

Q. What length of cable is generally used on those machines that you are familiar with?

A. One hundred to one hundred and twenty-five feet.

Q. And it wouldn't be practicable with a cable of that length to go out much farther than seventy-five feet, would it? A. No, not in one way.

Q. Now, how long have you worked down there at the Potlatch Lumber Company?

A. I started to work for them, to the best of my knowledge, in November, two years ago.

Q. Operated a Marion loader during that time, have you? A. No, I hooked tongs at first.

Q. On a loader? A. Yes.

Q. Did you hook tongs or run a loader when you were in the employ of the other company?

A. What other company?

Q. Well, the other companies you have had experience with? [85] A. Yes, sir.

Q. Did you do both? A. Yes, sir.

Q. Have you ever skidded logs with other loaders than the Marion? A. No, sir.

Q. You never saw any of the others in operation?

A. I have seen them in operation; I never seen them skid.

Q. Well, where did you see the Marion skid?

A. Potlatch.

(Testimony of George Westfall.)

Q. Where else? A. That is all.

Q. Well, I thought you told me that the places you had worked, the distance they skidded logs was seventy-five feet?

A. They didn't skid them. They were decked logs, decked up high, eight or ten high.

Q. Eight or ten high?

A. Yes, eight or ten logs high, keep rolling them down to the track and loading them. You might call it skidding, if you want to, but they were decked logs; they weren't going out in the brush after them.

Q. Then, as a matter of fact, these machines up here when you worked with them, wasn't being used for skidding logs at all, was they? A. Sir?

Q. This machine wasn't being used for skidding logs at all, was it?

The COURT.—Where, Mr. Swan?

Mr. SWAN.—At the time you mentioned, the other machine. The other machine you worked with.

The COURT.—I don't think I quite understand.

Mr. ELDER.—I submit to your Honor that is what he stated.

Mr. SWAN.—I want to know—he says here that he had a [86] certain rule or custom, and that they only run out seventy-five feet in skidding logs where he used to work, and now he says he didn't skid there at all.

The COURT.—Loading logs, not skidding. He was asked whether there was a limit beyond which they would not go in loading logs, and he said "yes seventy-five feet."

(Testimony of George Westfall.)

Mr. SWAN.—How long did you work on the loader up there? A. At Potlatch?

Q. No, at Spirit Lake?

A. I started to work there in March, and I worked off and on all summer, for definite periods.

Q. What?

A. Periods I worked there. The last month I was there, I run a machine there, a loader, a Marion.

Q. When these logs were laying around there at the loading station, if they were off a distance of seventy-five feet, then you would run that cable out, that Marion loader, and pull them in, is that what you mean as to the way the work was being done up there? A. At Spirit Lake?

Q. Yes? A. Pulling them in?

Q. Yes. A. We didn't pull any in; we loaded.

Q. You loaded from where they were decked?

A. Yes.

Q. That is the only experience you had up there?

A. Yes, sir.

Q. Just loading?

A. Loading and hooking both.

Q. Where did you hook?

A. Hooked in the line on the skidways. [87]

Q. That was in this same operation of loading?

A. Yes.

Q. And that is what your experience was confined to up there? A. Yes.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all. [88]

[Testimony of Charles Young, for Plaintiff.]

CHARLES YOUNG, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on ;

Direct Examination.

(By Mr. ELDER.)

Q. State your name. A. Charles Young.

Q. Where do you reside?

A. Near Liberty Lake.

Q. What is your occupation, Mr. Young?

A. Engineer.

Q. Have you ever had any experience with Marion steam loaders or loaders of that class or general design? A. Yes, sir.

Q. What experience have you had?

A. Oh, about eight or nine years, working, running and working around the machine.

Q. Where, Mr. Young, and for what companies?

A. Well, for the Dry Fork Lumber Company and Lynville, West Virginia, The West Virginia Lumber Company at Castle, West Virginia, Fremont Lumber Company at Eros, Louisiana, Spirit L. Lumber Company, Michigan.

Q. Any in this section?

A. The Capital Dominion Sawmill Company in Canada, the Idaho and Washington-Northern Railroad Company at Spirit Lake.

Q. You may state from your knowledge and experience whether or not logging companies generally use the Marion steam loaders or loaders of that class

(Testimony of Charles Young.)

or general design for the purpose of skidding logs.

A. No, not where I worked.

Q. Mr. Young, do you know what a haul-back line is? A. Yes, sir.

Q. Have you ever operated a machine equipped with a haul-back [89] line? A. Yes, sir.

Q. You may state, from your experience with machines of that class, Mr. Young, if a log sixteen inches at the top, 32 feet long, a tamarack log,—I don't believe that is in evidence, what kind of a log it was —was fastened to the main cable, and a haul-back line fastened on to this main cable, if that log could be held in its course by the engineer, by the use of his brake and the machinery on his drum and engine.

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion or opinion of the witness it does not tend to prove any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question, Mr. Witness.

A. Why you could hold it to a certain extent.

Mr. ELDER.—That is all.

Cross-examination.

(By Mr. SWAN.)

Q. I presume it would depend a good deal on the manner in which it was fastened? A. Sir?

Q. It would depend altogether on the manner in which the man fastened the haul-back line on to the log?

A. It wouldn't depend so much on how it was fast-

(Testimony of Charles Young.)

ened, so long as it stayed fastened.

Q. It would depend a good deal on the circumstances and conditions?

A. It wouldn't hold the log unless it stayed fastened.

Q. And whether it stayed fastened would depend altogther on the manner in which it was placed there?

A. Yes, sir.

Q. How long did you operate a machine on Spirit Lake? [90]

A. I didn't operate a Marion at Spirit Lake; I operated an American.

Q. How long did you operate that?

A. Two years and two months.

Q. Altogether? A. Yes, sir.

Q. And during that time you used it as a loading machine? A. Loading and ditching.

Q. What do you mean by ditching?

A. Used it as a ditcher in cleaning up along the right of way, holes and the like of that.

Q. Any of the time that you were loading there, did you have to pull any logs from the side of the track or a little distance away?

A. Oh, about sixty or seventy-five feet.

Q. In other words you wouldn't call that skidding though I suppose. A. No, sir.

Q. But, in other words, you would run that cable out for sixty or seventy-five feet and pull these logs in the manner described? A. Yes, sir.

Q. You would pull them in I mean?

A. Yes, you would pull them in a certain distance.

(Testimony of Charles Young.)

Q. You would run your cable out in different directions all around and pull the logs in?

A. Yes, sir.

Q. You didn't have any haul-back line, did you?

A. No, sir.

Q. Didn't have any signal-cord?

Q. The men pulled the line of themselves, didn't they? A. Yes.

Q. And fastened it into the logs and then pulled it back? [91] A. Yes.

Q. Nothing to steady the log at all? A. No, sir.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. You would simply fasten on to the logs and load them, wouldn't you, at that time?

A. Yes, sir.

Q. How would they fasten the cable on to the log?

A. With tongs.

Q. How many tongs? A. One.

Q. Where would you fasten it?

A. A long log you would fasten it close to the end, and a short log, you would fasten it in the middle or close to the middle.

Q. In those operations everybody is really in sight of the engineer, aren't they, all the time?

A. Yes, sir.

Q. In sight of one another? A. Yes, sir.

Q. And the loader is a lifting load, and not a pulling, isn't it?

Mr. SWAN.—I object to that; it is leading.

(Testimony of Charles Young.)

The COURT.—It is leading.

Mr. SWAN.—He has explained just how it is done.

Mr. ELDER.—I suppose it is leading. I was simply trying to get at the facts.

Q. You may state how a loader of this design and class is handled and how you load the logs.

Mr. SWAN.—I object, if the Court please, to that. It is immaterial. They weren't using it at the time, and I don't think [92] it makes any difference.

The COURT.—What you are trying to get at is whether a log is lifted or dragged?

Mr. ELDER.—Yes.

The COURT.—You may ask him whether it is dragged from any distance.

Mr. ELDER.—When you are loading from one of these machines, do you lift or drag the log?

A. You drag it until it gets within a certain distance of the boom, and then you lift it.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. You do that whether it is dragged a few feet or a great distance?

A. The boom sweeps out about fifteen or eighteen feet.

Q. The manner of dragging it along the ground would be just the same though?

The COURT.—Just the same as what?

Mr. SWAN.—Whether you pulled it in twenty feet, or whether you pulled it in seventy-five feet, you dragged it to the end of the crane, is what I wanted to

(Testimony of Charles Young.)

get at. A, Yes, sir.

Q. You drag it along the ground to the end of the crane and then raise it? A. Yes, sir.

Mr. SWAN.—That is all.

The COURT.—Gentlemen of the jury, there are some of you here who were not here yesterday evening, and I caution you not to discuss this case, or to permit anybody to discuss it with you or in your presence until the case is finally submitted to you. You may return at two o'clock. [93]

Accordingly, an adjournment was taken until two P. M.

At two P. M. the Court resumed its session, pursuant to adjournment, and the following proceedings were had, to wit:

[Testimony of Joe Cherry, for Plaintiff.]

JOE CHERRY, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name, Mr. Cherry.

A. Joe Cherry.

Q. What is your occupation? A. Woodsman.

Q. Have you ever had any experience with Marion steam loaders? A. Yes, sir.

Q. And with other loaders of that class?

A. Yes, sir.

Q. And general character? A. Yes, sir.

Q. Where?

A. In Arizona and New Mexico, and in the vicinity here.

(Testimony of Joe Cherry.)

Q. Ever work for any other company than this—are you in the employ of the Potlatch Lumber Company now? A. Yes, sir.

Q. Did you ever work for any other company in this section? A. Yes, sir.

Q. That used steam loaders? A. Yes, sir.

Q. How many years' experience have you had in working around steam loaders, Mr. Cherry?

A. Eight or ten.

Q. You may state, from your knowledge and observation, if [94] Marion steam loaders—were Marion steam loaders generally or commonly used by logging companies for the purpose of skidding logs?

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, and on the further ground that the witness has not shown himself qualified to answer the question.

The COURT.—Overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—You may answer.

A. Well, I have never seen them used for that purpose. Wherever I worked with these machines they had a limit, that was seventy-five feet from the loader, and outside of that, I have went outside of that only for this company, the Potlatch company.

Mr. ELDER.—Take the witness.

Cross-examination.

(By Mr. SWAN.)

Q. Where were you employed when you operated one, other than the Potlatch Lumber Company?

(Testimony of Joe Cherry.)

A. With the Arizona Lumber Company at Flagstaff, Arizona.

Q. Arizona Lumber Company? A. Yes, sir.

Q. Was that a Marion loader?

A. It was a Marion Model Ten.

Q. Is that used right alongside of the track where the cars are loaded? A. Yes, sir.

Q. That is the only place it was used?

Q. Isn't it true, in the place where you were loading those logs, the logs were loaded, or, rather, brought in and collected and piled alongside of the track by contract? A. By the company.

Q. By the contractor?

A. By the company. [95]

Q. By the company? A. Yes, sir.

Q. By what company?

A. By the Arizona Lumber Company.

Q. The Arizona Lumber Company?

A. Yes, sir.

Q. And in all those cases, though the logs were piled right up alongside of the track?

A. Yes, sir.

Q. Some distance away from the woods?

A. The steel was laid right into the timber.

Q. Then they would pull these logs right up alongside of the track and all you had to do was to load them? A. Yes, sir.

Q. How much of a cable did you have on the loader? A. One hundred and twenty-five feet.

Q. One hundred and twenty-five feet?

A. Yes, sir.

(Testimony of Joe Cherry.)

latch Lumber Company? A. A year last June.

Q. How? A. I came there a year ago last June.

Q. Have you operated a Marion loader during that time? A. Not altogether.

Q. Well, any portion of the time?

A. About three months and a half, I believe, I was on the loader.

Q. What did you do there?

A. I loaded and skidded.

Q. Loaded and skidded? A. Yes, sir.

Q. And how far out did you skid there? [98]

A. Three hundred and fifty or four hundred feet.

Q. Three hundred and fifty to four hundred feet?

A. Yes.

Q. That would be in connection with the loading of the cars, wouldn't it?

A. No, sir; they would skid enough for a load and then load it.

Q. Some logs there, I presume, would be piled up close to the track, and others would be scattered all around it? A. Yes, sir.

Q. And then you would run a line out in every direction and bring in those logs wherever they happened to be lying? A. Yes, sir.

Q. During what months was that? It was during the last year and a half, you say? A. Yes, sir.

Q. And it was customary there to do that right along, wasn't it?

A. I don't know about right along. There was a time last spring early that we didn't have to skid any.

(Testimony of Joe Cherry.)

We loaded right along the track.

Q. It would all depend on where the logs happened to be though, wouldn't it, Mr. Cherry? A. Yes.

Mr. SWAN.—I think that is all.

Mr. ELDER.—That is all. [99]

[Testimony of Ray Payzant, for Plaintiff.]

RAY PAYZANT, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. Ray Payzant.

Q. Where do you reside?

A. At Bovill.

Q. What is your occupation?

A. I am a donkey-engineer, what they call a donkey-man.

Q. How much experience have you had in running machines equipped with haul-back lines, such as a donkey or slide?

A. About eleven years, I should think, off and on.

Q. How many different companies have you worked for?

A. I couldn't say positively,—possibly a dozen or fourteen different companies, something of that kind.

Q. From your observation and knowledge, Mr. Payzant, you may state to the jury whether or not machines which are generally used by companies for skidding purposes are equipped with a haul-back line.

(Testimony of Ray Payzant.)

Mr. SWAN.—That is objected to as incompetent, irrelevant and immaterial, and for the reason that this witness has not shown himself qualified to answer that question, and it does not tend to prove any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question.

A. Yes, they are.

Mr. ELDER.—Q. Now, you may state, Mr. Payzant, if you were skidding with a machine equipped with a haul-back line and were going out say a distance of five hundred feet on a grade of ten per cent or a little more, your main line is hooked on to a log 32 feet long and 16 inches at the top, and your haul-back line is fastened to your main cable, could you, if the **[100]** machine is equipped as they are usually and generally equipped for skidding purposes, keep that log in its course?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, and calling for a conclusion of the witness, and it does not state any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Why, I could help to keep it in its course; I won't positively say I could keep it in a straight course.

Q. How would you do that?

Mr. SWAN.—The same objection.

(Testimony of Ray Payzant.)

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Why, by keeping the tension on my brakes and keeping the line tight.

Q. On which line? A. The haul-back.

Mr. ELDER.—You may take the witness.

Cross-examination.

(By Mr. SWAN.)

Q. How long have you run a donkey-engine?

A. Ten or eleven years, I think.

Q. You haven't operated any other kind of machines used in the woods excepting a donkey-engine?

A. That is all.

Q. That is the only kind you have operated.

A. Yes, sir.

Q. Now, as a matter of fact, the skidding that you have done with the donkey-engine has been out along distance in the woods, has it not?

A. No, not altogether.

Q. Well, how far out have you skidded with a donkey-engine?

A. I have skidded three thousand feet, perhaps. [101]

Q. And most of the time the work has required you to go out that far, has it?

A. Yes,—not that far, but from that to one thousand feet.

Q. From one thousand feet out to three thousand feet is about the way you have always skidded with your donkey-engine? A. Most of the time.

(Testimony of Ray Payzant.)

Q. And, as a matter of fact, you would always in those cases have a haul-back line clear around for the purpose of carrying out the cable, after you had pulled in the logs? A. Yes, sir.

Q. And you just pulled the cable right back out to the woods where the men wanted to use it again?

A. Yes, sir.

Q. And when you would rig that up I presume you would keep the line there in operation in that one position for at least several days at a time?

A. On that distance out; yes.

Q. Did you ever rig it up that you know of for fifteen minutes' work? A. No.

Q. What did you say? A. No, sir.

Q. Or an hour's work? A. Yes, I think so.

Q. You have done it for an hour's work?

A. Yes, sir.

Q. That is, if you had enough logs in that one particular path to keep you busy for an hour you would probably run a haul-back line out, is that the idea? A. I wouldn't; the rigging crew would.

Q. I say you would have that run out?

A. Yes, sir. [102]

Q. But if it was only for a short time or a few logs, out there, you wouldn't run it out, you wouldn't equip it with a haul-back line, would you?

A. I would either have to do that or leave them.

Q. You would either have to do that or leave them if they were away up? A. Yes.

Q. Now, when you have this line running clear out

(Testimony of Ray Payzant.)

and you pull the logs in there, you have what you call a sort of a skidway for pulling the logs along one certain path, don't you?

A. No, a skid road you call it.

Q. A skid road? A. Yes, sir.

Q. They always pull right along that same path or road? A. Yes, sir.

Q. Now, supposing you had some logs lying off here to one side, forty, or fifty, or sixty, or a hundred feet on each side of this main line, how do you get those in?

A. Yard them in with a yarding line, a short line coupled on.

Q. Is that what you call a choker?

A. No, sir; some places it is called a yarder or tag line.

Q. Is that operated by your machine just the same? A. Yes, sir.

Q. You run those down the side lines as far as necessary to pull the logs in?

A. Forty or fifty feet, perhaps.

Q. Whatever distance you can run it out to get the logs, isn't that true? A. Yes, sir.

Q. You don't rig up a haul-back for that, do you?

A. No, sir.

Q. You just pull those in without anything to steady them?

A. Pull them into the skid road? [103]

Q. Yes. A. Yes, sir.

Q. And then on down to the donkey-engine or loading place? A. Yes.

(Testimony of Ray Payzant.)

Q. That is all you do,—you don't do anything else?

A. I do everything in connection with that donkey.

Q. What I mean is, Mr. Payzant, you don't make any particular preparation or equipment, use any particular equipment for running these side lines out and pulling the logs in? A. No.

Q. When you pull those in, do you continue right on down with that log to the loading place?

A. No, sir; we pull them out to the road, then the tag line is taken off, and picked up and coupled up to the chokers.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Do the companies ever run a line out, say not more than five hundred feet, for a haul-back line, for logs say five hundred feet?

A. Yes, with a slide, not this particular kind of donkey that we have just been describing.

Q. What is the difference between this and a slide?

A. A slide is called a slide because it is made to run on the top of the cars, always left on top of the cars, even while we are skidding.

Q. Does it have two drums? A. Yes, sir.

Q. Signal wire, connected with it, signal cord?

Mr. SWAN.—That is objected to as immaterial.

The COURT.—Overruled.

Mr. SWAN.—An exception. [104]

(Testimony of Ray Payzant.)

A. Yes, sir, it has, as far as I have seen, it has a signal wire.

Q. In fact, one is just a little larger than the other, isn't that about the difference?

A. No, they are different built machines somewhat.

Q. Just explain to the jury so that they will understand what the difference is, Mr. Payzant?

A. They are a light built machine, just a purpose for this kind of work, although sometimes—

Q. For what kind of work?

A. For this skidding, and the slides have a boom on the front end of the sled, and another donkey don't use any boom on the sled.

Q. You mean a swinging—

A. It don't swing,—a stationary boom.

Q. What is that used for?

A. It is used so that they can load their logs as they skid them in.

Q. Then with a slide machine, they load the logs too? A. Yes, sir.

Q. And are those machines equipped with haul-back lines?

Mr. SWAN.—This is objected to as immaterial.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Yes, sir, they are.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. Did you ever operate one of those skids?

(Testimony of Ray Payzant.)

A. Just once. I haven't operated any in this particular part of the country.

Q. You haven't operated any in this part of the country? A. No, sir.

Q. You don't know how these slides in this part of the country are equipped, do you? [105]

A. I do.

Q. You say you do. A. Yes, sir.

Q. Where did you see them?

A. I saw what the Potlatch Lumber Company has.

Q. Did you ever use one down there?

A. No, sir.

Q. Do they have one right where you were working?

A. They have had several where I have been working.

Q. And they use those much the same as they do a donkey?

A. No, sir, they do not,—something the same.

Q. Well, in what respect does it differ from the donkey?

A. They use them for short skidding and loading along the railroad.

Q. How short?

A. Well, perhaps five hundred feet.

Q. Well, do they use them any further out?

A. They may; I am not aware if they do.

Q. You never saw them use them any further out than five hundred feet? A. No, sir.

Q. And the slide, of course, has to be used right

(Testimony of Ray Payzant.)

along the railroad, doesn't it?

A. Yes,—well, I won't say it has to be used, but they do use them along the railroad. They leave them on top of the cars.

Q. Did you ever see them operate a Marion?

A. Yes, sir.

Q. How? A. Yes, sir.

Q. Whereabouts?

A. I have seen the Potlatch Lumber Company people [106] operate their Marion.

Q. Anywhere else? A. I think not.

Q. You don't know of any other place?

A. I have seen Marion loaders other places, but I think I never seen them in operation.

Q. So far as you know they are in general use, are they not?

A. I couldn't say, I am sure; I have seen very few of them.

Q. Now, the Marion loaders down there, how many have you seen down there at the Potlatch Lumber Company? A. Two.

Q. They operate those quite extensively, don't they? A. Yes, sir.

Q. As a matter of fact, the operation of the Marion loader is very similar to that of the slide, isn't it? A. No, it is not.

Q. It is not the same? A. No, sir.

Q. In what respect do they differ?

A. Why, the slides are used more for short skidding purposes, I think. The Marions, as much as I have been watching them, are for loading big logs;

they may be doing other things, but that is all I have observed.

Q. The slide then is rigged up about the same for short distances as the donkey is for long distances?

A. Something the same, only the slides sit on the cars and do their own loading, and the donkey sits on the ground and they have a separate boom.

Q. They can load with a donkey-engine, though?

[107] A. Oh, yes.

Q. Any one of those machines can be used for either skidding or loading, if the opportunity or occasion requires, can they not?

A. They can all be used for skidding for their respective distances.

Q. And also for loading? A. Yes, sir.

Q. Now, you said something about you thought you might be able to control to some extent the log or logs in pulling in from the woods with a haul-back line, what do you mean by that?

A. You will have to ask the gentlemen what he meant by the question. I answered his question.

Q. You said you could control it to some extent. I want to know to what extent and in what manner you intended to infer that you could control the log?

A. If you want to stop, you can stop your rigging any place, while otherwise, coming down the hill or something, and you have got no way of stopping your rigging, and the log might carry it on down the hill.

Q. The haul-back is fastened to the cable, isn't it, that pulls in the log? A. It is.

(Testimony of Ray Payzant.)

Q. And it has no control whatever over the log itself?

A. The haul-back is fastened to the cable that is fastened on to the log?

Q. At the front end like this, and say this is the log here and the cable is fastened up at this end, pulling it this way? A. Yes, sir.

Q. Now, your haul-back comes around this way, and is fastened to the rigging? A Exactly.

Q. It doesn't in any way control the log behind it? [108]

A. It controls it to this extent, it has a tendency to be pulling it in all the time when the haul-back is properly put out,—if this line is properly put out it is—if a log is out here somewhere, it will hug this curve because there is a little tension on the haul-back all the time.

Q. Now, supposing when you are pulling that log in, Mr. Payzant, that the log starts to roll off like that, what is going to prevent it from swinging around in that way?

A. There is nothing can prevent the big end swinging around; it might swing clear around there, if you stop it, it might.

Q. Then, as a matter of fact, you can't control the swinging of the log, the only thing you can do with the haul-back line, if you use the brake and stop the rigging, is to hold the rigging back; isn't that true?

A. Yes, sir.

Q. Wouldn't that very fact there have a tendency to cause that log to swing around down the hill?

(Testimony of Ray Payzant.)

A. Not where there is a road, not where there has been logs made two or three trips over the road once.

Q. Supposing you didn't have any road there, supposing this was a place there where you was just pulling in a few stray logs, wouldn't it have a tendency, when you jerked on that rigging, to throw the log around that way? A. I don't know.

Q. Supposing that the rigging wasn't fastened securely to the log and the log broke loose, you couldn't control the movements of the log at all under those circumstances, could you?

A. Not when it is loose.

Q. Then the question of whether or not you could control to any extent whatever the movements of that log would depend upon the manner with which the rigging was fastened to the log and whether or not it held? [109] A. I don't understand you.

Q. I say, the question of whether you could control the movements of that log to any extent whatever would depend upon the manner in which the rigging was fastened into the log and whether or not it held.

A. Well, if the rigging holds you can stop the log anywhere, the front end of it.

Q. I understand that.

A. But the hind end of it, I wouldn't say.

Q. You couldn't control the rear end of it at all, or any part except the front end of it? A. No.

Q. Then, as I say, the controlling of it to any extent at all would depend upon the manner in which the rigging was fastened on to the log and whether or not the rigging held on to the log; isn't that true?

(Testimony of Ray Payzant.)

A. Yes, sir.

Mr. SWAN.—I think that is all.

Redirect Examination.

(By Mr. ELDER.)

Q. How are the logs fastened on to those cables?

Mr. SWAN.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. By a short piece of cable that we call a choker.

Q. How is it fastened on to the log?

A. It is hooked around and then hooked on to the main cable.

Mr. ELDER.—I believe that is all.

Mr. SWAN.—That is all.

Mr. ELDER.—We want to recall Mr. Younkin for one question. **[110]**

[Testimony of Harry Younkin, for Plaintiff (Recalled).]

HARRY YOUNKIN, a witness heretofore duly called and sworn on behalf of the plaintiff, upon being recalled, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. Mr. Younkin, how far was this tree which was knocked over on to Mr. Harkins from the line between the skidding machine and the place where they hooked on to this log?

Mr. SWAN.—I object to that, if the Court please, on the ground that this man stated that he wasn't

(Testimony of Harry Younkin.)

there and didn't know anything about it.

The COURT.—Sustained.

Mr. ELDER.—Mr. Younkin, do you know where the machine stood at that time? A. Yes, sir.

Q. Do you know where the log was that they hooked on to?

Mr. SWAN.—He said he didn't; if the Court please, I don't see how he can answer the question.

Mr. ELDER.—He said he wasn't there.

Mr. SWAN.—Certainly if he wasn't there, he couldn't tell.

The COURT.—He may answer whether or not he did know.

A. Well, sir, all I know is what they told me afterwards.

Mr. SWAN.—That is enough.

Mr. ELDER.—Q. You don't know then of your own personal knowledge where the log was?

A. No, sir.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all. [111]

[Testimony of Mrs. Susan Harkins, for Plaintiff.]

Mrs. SUSAN HARKINS, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name.

Mr. SWAN.—It might shorten this case up a little by stating that the defendant admits that this witness

(Testimony of Mrs. Susan Harkins.)

was the wife of Mr. Harkins and is now the widow of Mr. Harkins, that he was killed at the time and place mentioned in the complaint, and that he was a kind and loving husband, as alleged in the complaint, and that he was of the age also alleged.

Mr. ELDER.—Q. How long had you been married? A. We were married in 1900.

Q. What was your husband's occupation?

A. Usually a millman by occupation.

Q. What had he engaged in?

A. He used to be in business for himself, was running a mill and then of later years he was a filer of hand-saws, and at one time, at different times, he was a scaler.

Q. What did he usually earn?

A. Filing hand-saws he got six and six and a half a day. For one company he got seven dollars for a period of three months.

Q. What did he usually and generally make per day?

Mr. SWAN.—I don't think counsel ought to be allowed to go over a wide range in this matter, if the Court please, and I think the line of questions should be confined to at least a year or two prior to his death.

The COURT.—Well, I think it may be confined to the period after the marriage of the witness to the deceased.

Mr. ELDER.—Q. All you have testified to has been employments he has engaged in since you were married?

A. Yes, sir, at the time we were married, he was

(Testimony of Mrs. Susan Harkins.)

the [112] owner of a sawmill.

Mr. ELDER.—I believe it is admitted that he was earning three dollars and fifty cents a day at the work he was engaged in?

Mr. SWAN.—I thought you alleged two dollars and fifty cents.

Mr. ELDER.—Three dollars and fifty cents.

Mr. SWAN.—Just a moment.

The COURT.—The complaint says two dollars and fifty cents.

Mr. SWAN.—I wouldn't want to admit that then. You might prove that.

The COURT.—You admit that expressly in your answer.

Mr. SWAN.—All right.

Mr. ELDER.—Q. Mrs. Harkins, did Mr. Harkins furnish you any part of his earnings for your support?

A. Yes, sir; our bank account was kept jointly; it was for both.

Q. What did he do with his money when he earned it?

A. Usually brought it home and put it in the bank after the bills were paid.

Q. And you were allowed to check on the account, were you? A. Yes, sir.

Q. Do you know what your husband usually or generally earned per month, or about what he was earning?

Mr. SWAN.—I think, if your Honor please, that what he did and actually earned at different times

(Testimony of Mrs. Susan Harkins.)

might be admissible, but I don't think counsel could say what he was accustomed to earn over any given period, that is, the average; I think he would have to be specific in the proof.

The COURT.—Yes, I think so.

Mr. ELDER.—Q. You may state, in the last few years before your husband's death, what he earned?

The COURT.—Do you mean per day, per month or what? [113]

Mr. ELDER.—Q. Per month?

A. Well, it was according to the work he was doing. If he was scaling or working in the woods he got about three dollars and fifty cents, or three dollars and seventy-five cents per day.

Q. What did he get when he was scaling?

A. Three dollars and seventy-five cents, I believe, is what he got.

Q. How much of his time, if you know, was he engaged in that work? A. I don't remember.

Q. Did he do any other work than scaling, if you know, scaling and woods work? A. In the woods?

Q. Yes.

A. I couldn't say; I believe he fired at one time a little while at Spirit Lake for the company when he first came there.

Q. Do you know how much a day or month he got there?

A. I don't know exactly what he got; I couldn't say, sir.

Q. Was your husband an able-bodied man?

A. Yes, sir.

(Testimony of Mrs. Susan Harkins.)

Q. He wasn't suffering from any afflictions of any kind? A. No, sir, he was well.

Mr. ELDER.—I believe that is all.

Cross-examination.

(By Mr. SWAN.)

Q. Do you know about how long he was employed as a scaler, Mrs. Harkins?

A. I couldn't say just how long.

Q. Two or three years? **[114]**

A. Not just at one time.

Q. But altogether he had probably had that much experience? A. I would say about two years.

Q. About two years as a scaler?

A. I couldn't say definitely.

Q. I presume that work required him to be in the woods a good deal? A. On the cars a good deal.

Q. He also worked in the woods more or less?

A. Not in the woods so much,—around the mills more.

Q. Around the woods? A. Yes.

Q. But he was obliged in his work to be in the woods more or less. I think you made the remark that he was a woodsman.

A. Well, that is, following the lumber business.

Q. He had been following the logging business for quite a long time, had he not?

A. Yes, and for himself.

Q. And since that time?

A. When he was scaling, you see, he scaled off of the cars they were loading; he didn't have to go into the woods for that purpose.

(Testimony of Mrs. Susan Harkins.)

Q. But prior to that time he had been in business for himself and he was a woodsman then?

A. I don't know that you would call it much of a woodsman. He didn't do the work in the woods himself; he had men working for him.

Q. You say he fired for a time at Spirit Lake. You mean he was fireman for one of the machines?

A. Fired on a loader for a time.

Q. What kind of a loader was that? **[115]**

A. Marion loader.

Q. How long did he fire on the Marion loader?

A. A short period; I couldn't say just how long,—about three months, something like that.

Q. About three months, and then he went to work for the Potlatch Lumber Company in June, 1911?

A. No, he didn't begin in June.

Q. July?

A. It must have been the latter part of July; I couldn't just say whether it was the latter part of July or in August.

Q. From that time on he worked for Mr. Younkin down in the woods around Bovill? A. Yes, sir.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all, Mrs. Harkins.

That is our case.

Mr. SWAN.—If the Court please, I desire to move the Court to dismiss the action of the plaintiff for the reason and upon the ground that the plaintiff has wholly failed to show any negligence on the part of the defendant which resulted in the death of Mr. Harkins, and upon the further ground that the evi-

dence shows conclusively that all the risks and dangers incident to the use of a Marion steam loader in the manner in which it was being operated at the time of the accident was well known to Mr. Harkins, and assumed by him. That the negligence, if any, which resulted in the death of Mr. Harkins, was the negligence of a fellow-servant.

The COURT.—The motion is denied.

Mr. SWAN.—An exception.

The COURT.—Gentlemen of the jury, you may be at ease for five minutes.

A five minute recess was taken.

Mr. SWAN.—May it please the Court and gentlemen of the jury, the evidence on behalf of the defendant will be very short, **[116]** and I will try and be as brief as I can in my remarks, and also in putting in the testimony. It is admitted in this case that this accident to Mr. Harkins happened down there near Bovill while he was in the employ of the defendant company. We expect to show you, however, that the accident was one for which the defendant company was in no way responsible, and could not have been prevented by the exercise of ordinary care and prudence. We will endeavor to show you by witnesses and by men of experience who have been in the logging business for a great many years, that a Marion steam loader such as the one in use at this time is a reasonably safe machine, one of the best machines for that purpose, and that it is in general use all over the country, for loading, and also for skidding in logs for any distance up to five hundred

(Testimony of E. M. Rogers.)

feet. It is not practicable to have haul-back lines, and you could not do the work that way, and the machine in use here was the one in general use all over under those conditions and circumstances, and there is absolutely no negligence here for which this defendant is responsible, and having shown that, we shall ask a verdict at your hands. **[117]**

[Testimony of E. M. Rogers, for Defendant.]

E. M. ROGERS, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name, please, Mr. Rogers.

A. E. M. Rogers.

Q. What is your business, Mr. Rogers?

A. General superintendent of the Blackwell Lumber Company.

Q. How long have you occupied that position?

A. I have been with this company five years this coming spring.

Q. How many years' experience have you had in woods, in the logging business? A. About thirty.

Q. In various parts of the country? A. Yes, sir.

Q. I will ask you to state whether or not you are familiar with a machine known as the Marion steam loader. A. Yes, sir.

Q. State whether or not that machine is in general use throughout the country for loading and skidding logs, for a distance of four or five hundred feet.

Mr. ELDER.—I object to that as incompetent,

(Testimony of E. M. Rogers.)

irrelevant, and immaterial, and the witness hasn't qualified himself, and for the further reason that it is double and may be answered yes and only mean that it is in use for loading purposes.

The COURT.—Overruled. Answer the question.

A. What is the question, please?

Mr. SWAN.—Read the question to him.

(Last question read.)

A. Yes, sir.

Q. You may state whether or not, Mr. Rogers, the machine **[118]** known as the Marion steam loader is a reasonably safe machine for that purpose.

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and it calls for a conclusion of this witness. That is a matter for the jury to determine, your Honor.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. "Mr. Rogers, the testimony in this case tends to prove that the Potlatch Lumber Company, the defendant, was using a Marion steam loader, with a five hundred foot five-eighths cable, and that they were skidding logs, or hauling in logs from various directions a direction of between three and four hundred feet with this machine, that the log started to roll down a hill, and struck a tree, knocking it down, a dead tree, knocking it down, and killing the deceased. I will ask you to state whether or not, basing your answer upon your experience in the woods and your logging business, and your knowledge of the conditions, if that work was being

(Testimony of E. M. Rogers.)

done in a reasonably safe and customary manner."

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and the witness hasn't shown himself qualified, and calling for a conclusion and opinion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. Mr. Rogers, how long have you had experience with a Marion loader, or one similar to that?

A. Ever since they have been in use in the woods.

Q. How long is that?

A. Between fifteen and twenty years.

Q. Have you had experience also with other loaders of a similar character? A. Yes, sir.

Q. Also with skidding machines? **[119]**

A. Yes, sir.

Q. Can you state briefly what kinds of machines you are familiar with? A. Yes, sir.

Q. I wish you would, please.

A. Acquainted with the Clyde Iron Works, the machine they call the Spreader, Barnhart, the American and the McGifford and the machines made on the coast here by the Willamette Iron Works.

Q. They are all similar in operation, are they?

A. Yes, sir.

Q. Now, Mr. Rogers, in your experience in the logging business, I wish you would state briefly the general method in use in dragging in logs from various distances out into the woods.

A. Well, according to the location and the way the

(Testimony of E. M. Rogers.)

logs are, where we have these appliances the machine we use is the loader, to drag in the logs from three to five hundred feet from the track. When you go back farther than that you use a larger machine, a heavier cable, back from twenty-five hundred to thirty-five hundred feet. With a loader from three to five hundred feet.

Q. For a distance of five hundred feet?

A. Yes, sir.

Q. That is a loader similar to the Marion?

A. Yes, sir.

Q. Or one of that character? A. Yes, sir.

Q. Those loading machines are not equipped with either a signal cord or a haul-back? A. No, sir.

Q. State whether or not it is customary in hauling in for a distance of five hundred feet, or within that radius, to use a haul-back? A. No, sir, it is not.

Q. Did you ever know it to be done? A. No, sir.

[120]

"Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose?"

Mr. ELDER.—Just a minute. I object to that for the reason that it calls for an opinion and conclusion of this witness. It has already been ruled upon by the Court once.

Mr. SWAN.—I would like to be heard just a moment, if the Court please, on that. The test in cases of this kind, if there is any cause of action here, is

(Testimony of E. M. Rogers.)

whether or not this machine was a reasonably safe machine for the purpose for which it was used. Now, that is not a matter of common knowledge; it is not a matter which a jury is qualified to pass upon. It must of necessity depend upon the experience and qualifications of the men who have had experience in that line of work. Just the same as a certain locomotive might or might not be a reasonably safe locomotive to use under certain conditions, and no one can testify to that or determine that or even remotely guess at it unless he has some evidence from the party who is experienced in that line of work of that kind. I submit, if the Court please, that this question is proper, and I have at this time, at least qualified this witness to the extent of being permitted to have him answer that question.

The COURT.—The objection is sustained.

Mr. SWAN.—Does your Honor hold that it is objectionable on the ground that it is not the subject for expert testimony?

The COURT.—Yes, it involves a mixed question of law and fact as to what is reasonably safe.

Mr. SWAN.—An exception, please.

The COURT.—Yes.

Mr. SWAN.—Q. Mr. Rogers, can you give me an idea generally as to how many of these machines, or how many companies use these machines in that manner?

A. The Potlatch Lumber Company, Panhandle Lumber Company, [121] Barnhart machine, and the other companies use the American, which is on

(Testimony of E. M. Rogers.)

the same principle.

Q. They are in general use? A. Yes, sir.

Q. All over the country? A. Yes, sir.

Q. And have been for how many years?

A. The Barnhart has been out in this country probably six or seven years.

Q. For skidding purposes within that distance?

A. For skidding and loading, yes, sir.

Mr. SWAN.—You may take the witness.

Cross-examination.

(By Mr. ELDER.)

Q. What is this slide machine you mentioned?

A. It is a machine used on top of the cars, slides across from one car to the other.

Q. Does it have two drums on it? A. Yes, sir.

Q. What are both drums for?

A. One drum is to hoist with and the other is to move the logs.

Q. Isn't it equipped with one drum for the purpose of putting a haul-back line on it?

A. Either way you want it.

Q. Isn't it a fact that you use that machine for the purpose of bringing in logs from three to five hundred feet, with a haul-back on it? A. No, sir.

Q. Didn't you ever see that done?

A. No, sir.

Q. Where did you ever see a Marion steam loader used for the purpose of getting logs and loading them over seventy-five feet from the train? [122]

A. I have seen them used by the Potlatch Lumber

(Testimony of E. M. Rogers.)

Company, the American, and I think I have seen them used in the east a good many different places.

Q. What companies?

A. The Weyerhaeuser people.

Q. Where are they?

A. Minnesota. John O'Brien, a good many of them. I couldn't repeat them right off.

Q. You never operated one of these machines did you? A. I never operated it personally, no.

Q. In your life. You don't know anything about the handling of the machine itself?

A. How do you mean? Operating it personally?

Q. Yes, sir.

A. No, sir, I never operated it myself.

Q. You are the general superintendent of the Blackwell Lumber Company? A. Yes, sir.

Q. Is it a company with the Weyerhaeuser interests? A. No, sir.

Q. Mr. Weyerhaeuser don't own any stock in that company? A. Not a nickel.

Q. Did you say you had seen the Panhandle Lumber Company use these machines? A. Yes, sir.

Q. And you have seen them go out four and five hundred feet for their logs? A. Yes, sir.

Q. Where? A. Along different places.

Q. At what places?

A. I couldn't mention the place. **[123]**

Q. Can you give us one place where you saw it?

A. I don't know what the name of the place is. It is some spur along the main line—I don't know the station.

(Testimony of E. M. Rogers.)

Q. Do you know who was operating the machine?

A. The Panhandle Lumber Company.

Q. Do you know any man that was working on the machine? A. No, sir.

Q. When was that? When did you see that?

A. I have seen it several times the last four or five years.

Q. Can you give us any particular date or any time? A. No, sir.

Q. Or any particular place where you saw them?

A. Along their line.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all. **[124]**

[Testimony of R. M. Hart, for Defendant.]

R. M. HART, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name. A. R. M. Hart.

Q. You live here in Coeur d'Alene?

A. Yes, sir.

Q. What is your business, please?

A. I work for the Blackwell Lumber Company.

Q. How long have you been employed by the Blackwell Lumber Company?

A. Since its incorporation.

Q. I will ask you to state whether or not you have had any experience in logging operations.

A. At the present time I have charge and superintendence of the logging operations.

(Testimony of R. M. Hart.)

Q. Of the Blackwell Lumber Company?

A. Yes, sir.

Q. How long have you had experience with logging operations in the woods?

A. For the last few years.

Q. About how long—three or four years?

A. Three or four years.

Q. I will ask you to state whether or not you are familiar with what is known as the Marion steam loader.

A. I am familiar with the workings of it.

Q. Have you seen that loader or loaders similar to that in operation? A. Yes, sir.

Q. How many places, or how many machines?

A. Well, all machines, The Blackwell Lumber Company,—while they are not the Marion, they all practically work on the same [125] line when they are skidding.

Q. You have, then, machines similar in character to the Marion, in your company?

A. Except that we do not have a revolving machine. We have had an American; we haven't it now.

Q. The American is about the same as the Marion?

A. It works on the same principle.

Q. Do the other machines you mentioned also work on the same principles, outside of the fact that the boom swings?

A. Yes; the same machine, except that they do not revolve.

Q. Otherwise, they are the same?

(Testimony of R. M. Hart.)

A. Yes, sir; in pulling in the logs.

Q. I will ask you to state whether or not, if you know, the Marion steam loader or one similar to that is customarily or generally used for skidding in logs for a distance of five hundred feet or less.

Mr. ELDER.—I object to that for the reason that the witness hasn't shown himself competent to answer the question.

The COURT.—Sustained.

Mr. SWAN.—Q. Do you know, Mr. Hart, whether machines of that character are in general use over the country?

Mr. ELDER.—I object to that for the same reason.

The COURT.—He may answer yes or not.

A. Yes.

Q. Do you know where they are used?

A. Yes, sir.

Q. I wish you would state where they are used, as far as your knowledge goes.

The COURT.—You mean where he has seen them used?

Mr. SWAN.—Yes, sir.

A. The Panhandle Lumber Company, The Potlatch Lumber Company, the Blackwell Lumber Company. [126]

Q. I will ask you to state whether or not those machines that you have mentioned are used for skidding purposes. A. They are.

Mr. ELDER.—Just a minute.

The WITNESS.—Pardon me, sir.

Mr. ELDER.—I object to that for the reason that

(Testimony of R. M. Hart.)

it is no criterion. It doesn't show general use.

The COURT.—Well, it may go to the jury. Of course, it don't show a general use. The extent of the observation of any witness is somewhat limited. No witness knows all about it. If a witness has observed only a few cases, of course, his observation wouldn't have as much weight with the jury as if he had observed more, but it is material and competent. The answer may state.

Mr. SWAN.—Q. For what distance did they use those machines for skidding purposes?

A. Well, with the loading machines, up to six hundred feet.

Q. That is what I mean, loading machines?

A. Yes, sir.

Q. Beyond that, what is the custom?

A. Either use donkeys or horses, or something of that kind.

Q. State whether or not these machines that you have referred to are equipped with haul-back line and signal cord? A. They are not.

Q. From your observation and knowledge, so far as you have had an opportunity to observe, I will ask you to state whether or not it is customary in this part of the country to use a machine rigged up with a haul-back line for the purpose of skidding logs, within a radius of five hundred feet.

Mr. ELDER.—I object to that for the reason that he confines it to a limited space. The question confines it to this section here. [127]

The COURT.—Overruled.

(Testimony of R. M. Hart.)

Mr. SWAN.—You may answer the question.

WITNESS.—Will you repeat that question, Mr. Reporter? (Last question read.)

Mr. ELDER.—For the further reason that he hasn't shown himself qualified. He is only shown to know of three companies.

The COURT.—Overruled.

A. It is not.

Mr. SWAN.—Q. What is the customary thing under those conditions?

A. When you are using the loader for skidding, distances up to five or six hundred feet, you simply use the cable that is on the drum, and it is taken out by hand. It isn't attempted to put a pull-back cable on for that distance. It would be too burdensome and expensive. For a distance say of fifteen hundred, two thousand, three thousand, or four thousand feet, where you have to use a very heavy cable, of course, it is natural and necessary to have a pull-back cable.

Q. What is the purpose, Mr. Hart, of the haul-back line?

Mr. ELDER.—Objected to for the reason that the witness hasn't shown that he knows; he isn't qualified.

Mr. SWAN.—He has had four or five years' experience.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. To take the heavy cable out that pulls the logs in.

(Testimony of R. M. Hart.)

Q. Now, do you know, or have you made any investigations as to whether or not the Marion steam loader, or one similar to that is in general use throughout the country?

A. I have made investigations.

Q. And do you know whether or not it is?

Mr. ELDER.—I object to that.

The COURT.—I don't think it is material to know whether [128] or not the Marion steam loader is in use throughout the country.

Mr. SWAN.—Well, I don't know as I should confine it to the Marion steam loader. I mean other loaders, or machines of a similar character, for the purpose of skidding logs within a radius of five hundred feet.

A. I have investigated that, yes, sir.

Q. Do you know whether they are? Just answer yes or no.

Mr. ELDER.—I object to it for the reason that the witness hasn't shown qualifications.

Mr. SWAN.—If the Court please, I think he could answer yes or no.

Mr. ELDER.—I submit, your Honor, he should state his investigations.

Mr. SWAN.—That is a matter for cross-examination.

The COURT.—I will permit you to cross-examine him as to his qualifications, if he says that he does know. You may answer whether or not you know. Answer yes or no.

A. May I have the question read, please?

(Testimony of R. M. Hart.)

The COURT.—Yes, read the question.

(Last question read.)

A. In general use for a distance of five and six hundred feet?

Mr. SWAN.—Q. Yes. I say, do you know whether or not they are or not?

A. I can only state from my investigations, because we are buying some of the machines now.

Q. That is what I want to know, whether you do or not?

A. Well, I do know that they are used for that, from my investigations, you understand.

The COURT.—The witness, I suppose, didn't understand the ruling. The answer may be stricken out. [129]

Mr. SWAN.—Q. I will ask you to state whether or not you know. Just answer yes or no.

The COURT.—Perhaps this isn't quite fair to the witness, as a layman. You ask the man whether he knew. Often he feels that he does know without having really what we call legal knowledge.

WITNESS.—I have seen a machine work at various distances.

The COURT.—Just a moment, Mr. Witness; I think you may ask him the question directly, Mr. Swan, whether or not the Marion steam loader is used for skidding logs different distances generally throughout the country, and I will permit you to interrogate him as to his qualifications. Don't answer this question yet.

Mr. SWAN.—Q. "I will ask you, Mr. Hart,

(Testimony of R. M. Hart.)

whether or not the Marion steam loader, or one of similar character, is in general use throughout the country for the purpose of skidding logs within the radius of five or six hundred feet?"

A. I do know.

Q. Is it, or is it not? A. It is.

The COURT.—Just a moment. You may cross-examine him as to his qualifications if you desire, Mr. Elder.

Mr. ELDER.—Q. Mr. Hart, what investigation did you make as to the use of the Marion steam loader?

A. We are buying some loaders of a similar character now, and before signing the contract to purchase them, we did investigate them, *as were* particular to find out how far they would skid back, as that is one of the big qualifications of these loaders that turn around.

Q. Did you inquire of the people that make the Marion loader?

A. Not of the Marion people, but of people who have used them for the last twenty years. [130]

Q. Did you make inquiry of the Marion people?

A. No, but of the people who have used the Marion for the last fifteen and twenty, as high as twenty-five years, since they have been on the market.

Q. Have you ever had any dealings with the Marion people at all?

A. With the Marion people?

Q. Yes.

A. The Marion people manufacture this machine,

(Testimony of R. M. Hart.)

and I, as a director of the Panhandle Lumber Company, naturally have had some dealings with them, and of the Idaho-Washington Northern Railroad Company.

Q. Isn't it a fact that they don't advertise their machine as a skidding machine at all, but do advertise it solely as a loading machine?

A. They advertise it as a machine to load logs and to skid alongside of the track for two hundred yards. That is the big qualification of the machine, and the strongest talking point about it, that it will skid logs back two hundred yards.

Q. Was all the investigation you had regarding these machines by correspondence? A. Oh, no.

Q. Where did you examine the machines?

A. Where did we examine them?

Q. Yes.

A. We examined them at the Panhandle Lumber Company, The Idaho and Washington Northern Railroad. Their agent was here, catalogues and pictures.

Q. You never saw any of the machines operated except at those places? A. Well, the Marion?

Q. Yes, or machines of its class and type.

A. Yes, we have seen them operate at the Panhandle, [131] along the I. W. N. Railroad.

Q. That is all the same, isn't it?

A. No, it is two separate and distinct corporations.

Q. Doesn't one company own all of the loaders?

A. No. Possibly one company may own all the loaders. As to who owns the loaders, I believe the

(Testimony of R. M. Hart.)

railroad owns them.

Q. And operates them?

A. And operates them, probably.

Q. Where else have you seen them?

A. I have seen them along the Bovill branch of the Milwaukee road.

Q. That is the Potlatch Lumber Company?

A. That is the Potlatch Lumber Company. Those are Marions we are speaking of. As far as similar machines are concerned, we have owned them ever since the company has been operated and used them practically six, or seven, or eight months out of the year.

Q. And that is the only experience you have had with them? A. Yes, sir.

Mr. ELDER.—We object to the question for the reason that the witness hasn't shown qualifications.

The COURT.—I think I shall sustain the objection.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. Mr. Hart, you have, I believe, watched the operation of these machines for the past several years? A. Yes, sir.

Q. Quite frequently? A. Yes, sir.

Q. "I will ask you to state whether or not, from your experience and observation, those machines are reasonably safe for the purpose of skidding in logs within a radius of five hundred feet?" [132]

Mr. ELDER.—I object to the question for the reason that it calls for an opinion and a conclusion of

(Testimony of Thomas P. Jones.)

this witness, and is incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SWAN.—An exception. That is all, Mr. Hart.

Mr. ELDER.—That is all, Mr. Hart. [133]

[Testimony of Thomas P. Jones, for Defendant.]

THOMAS P. JONES, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name. A. Thomas P. Jones.

Q. What is your occupation, Mr. Jones?

A. I am in the employ of the Potlatch Lumber Company.

Q. In what capacity?

A. Superintendent of the wood department.

Q. The logging operations are under your supervision? A. They are.

Q. How long have you been superintendent of the logging department? A. About ten years.

Q. For the Potlatch Lumber Company?

A. Yes, sir.

Q. What experience, if any, did you have prior to that time? A. About twenty-four years.

Q. Do you mean that your woods' experience covers a period of thirty years or more?

A. Yes, sir.

Q. In what parts of the country?

A. Minnesota, Wisconsin—

(Testimony of Thomas P. Jones.)

Q. Where else?

A. No place else, except observation, and right here.

Q. Now, are you familiar with the machine known as the Marion steam loader, and similar machines to it? A. I am.

Q. How long have you been familiar with that machine?

A. I have been familiar with the Marion for about four years; others for about fourteen. **[134]**

Q. What other machines or similar to the Marion with which you are familiar, and which operate about the same?

A. So far as the operation is concerned, they are all about the same.

Q. Well, the American?

A. I have seen the American work, but never have noticed them—I have used the McGifford, the Crowder, the slides of all descriptions, for the past fourteen years.

Q. I wish you would explain briefly the manner of operating the machines, for loading and skidding logs.

A. The slides are a two-drum machine, and so is the McGifford, equipped with one drum to move the cars under the loader in loading logs, but when we are skidding and loading the one drum is used to move the cars as we load them, and the other to load them. When we go back further then we sometimes equip those with a haul-back and go back from five hundred to one thousand or fifteen hundred feet.

(Testimony of Thomas P. Jones.)

Q. Equip what?

A. Those loaders, with a haul-back, when we go further than the men can pull the cable out; then we use them with a haul-back as far as one thousand feet. We have also used them as far as a thousand or fifteen hundred feet without a haul-back, used a horse to pull it back, when it is too heavy for the men to pull it back.

Q. I will ask you to state whether or not you have been, in the past four or five years accustomed to skidding logs with the Marion steam loader within a radius of five hundred feet. A. We have.

Mr. ELDER.—I object to that as immaterial.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. We have. [135]

Q. Now, do you know of other places, or companies who use the machine for the same purpose?

A. I never saw them used any place except on the Panhandle, and that was for pulling in and loading. I don't know as they went back any more than seventy-five feet, although I saw logs back further, and they probably got them, although I don't know. That is where I went to see them working, with the view of buying them, for the purpose of skidding and loading, short skidding, and for investigation by our company for a year or so, to get loaders to do the short skidding.

Q. You say you had some experience back east?

A. Yes, sir.

Q. Now, you say you used those loaders, or have

(Testimony of Thomas P. Jones.)

used these loaders for the past four or five years?

A. About four years,—well, three years, I think we have really been using them, between three and four years.

Q. Now, do you know of other places where those loaders are used?

A. I know of places by hearsay. I don't know them. I haven't went to see them any place except the Panhandle.

Q. I will ask you to state whether or not you have made any inquiry or investigation about the use of these.

A. We did before we purchased them. Our company made all kinds of investigations.

Q. What kind of investigations did you make?

A. We made investigations by writing to people in the south that had been using them, and in the east that had been using them.

Q. What was the result of your investigations?

Mr. ELDER.—I object to that as hearsay.

The COURT.—Sustained.

Mr. SWAN.—Q. How many loaders of this kind has your company got? [136]

A. You mean the Marion loaders?

Q. Similar loaders?

A. Nine,—eight or nine,—nine.

Q. Do you operate those in the same manner?

A. Yes, sir, we do.

Q. Have you had any experience in other localities in skidding logs within a radius of five hundred feet?

A. I have.

(Testimony of Thomas P. Jones.)

Q. What experience, if any, have you had, and where?

A. I had about twenty-four years in Minnesota and Wisconsin.

Q. Well, during that time, what was the method of skidding those logs?

Mr. ELDER.—I think that is immaterial, your Honor.

The COURT.—Overruled.

A. The last fourteen years,—eighteen years,—I had eight years of experience with loaders prior to coming to the Potlatch Lumber Company.

Q. That is what I wanted to know. What is the character of those loaders?

A. They were these slides, the Cody—I had some Cody loaders.

Q. You had about eight years, you say, there?

A. Yes, sir.

Q. Using a similar machine? A. Yes.

Q. State whether or not you then used a similar machine to this for the purpose of skidding logs back within the radius of five hundred feet.

A. I didn't use the turn-around machines, as they call them; I used those others, the same thing.

Q. I mean a similar machine.

A. Yes, sir, a similar machine. I don't understand [137] what you mean by similar,—one whose works are similar?

Q. One that is operated in practically the same manner.

(Testimony of Thomas P. Jones.)

A. The operation of all of them is practically the same.

Q. Now, what experience did you have back there, if any, in regard to skidding in logs within a radius of five hundred feet?

A. I had eight years of experience with them. We skidded with them for about eight years within a radius of five hundred feet, and sometimes further than five hundred feet.

Q. Did you at that time, or was it customary at that time, to use a haul-back line when skidding logs within five hundred feet of the track?

Mr. ELDER.—I object to that. He confined it to a period too remote from the present-day operations.

The COURT.—Overruled.

Mr. SWAN.—You may answer the question.

A. We never used a haul-back line unless we had to go through timber that was within five hundred feet of the track, to get a lot of timber further back.

Q. Now, based upon your thirty years' or more experience, I will ask you to state whether or not it is customary when skidding logs within a radius of five hundred feet, to use a haul-back line.

A. It is not.

Q. Now, did you see the operation of this Marion loader or a similar machine prior to the time your company purchased it?

A. I never saw the operation except the loader, for the Panhandle Company. I went down there to investigate the machine and looked at it prior to purchasing.

(Testimony of Thomas P. Jones.)

Q. That was when you started your investigations to find out about it? [138] A. Yes, sir.

Q. What is the purpose of a haul-back line?

Mr. ELDER.—Objected to for the reason that he hasn't shown knowledge.

The COURT.—He may answer.

A. To pull a cable back into the woods, the haul-in cable, to save the men doing it, too far, and too expensive.

Q. I might ask you this, Mr. Jones, will you explain to the jury the manner in which the Marion loaders skid in a log for a distance of three or four or five hundred feet, as compared with the other loading or skidding machines that you have known.

A. The difference is, that I think the Marion loader swings around and the others don't. The other loaders have a boom sticking out straight in front, and the *engine* is standing near, the *engine* watching his boom, and the Marion loader swings around where he can see his men in every direction, and he is in plain view of them all the time, unless the cable goes to where he can't see them.

Q. You mean the boom swings around?

A. The whole thing, that is the reason we purchased them to do this work, in preference to the other loaders, because we considered they were safer, the machine swings around where he could see his men all the time.

Mr. ELDER.—I object to what he considered.

Mr. SWAN.—Q. Prior to purchasing this Marion loader, had you used the other machines of the same

(Testimony of Thomas P. Jones.)

character and for the same purpose and in a similar manner? A. We had.

Q. For how long a time?

A. I think we used them here at the Potlatch about seven years.

Q. For skidding and loading? [139]

A. Both for skidding and loading.

Q. "Now, from your knowledge and experience of thirty years in the logging business, I will ask you to state whether or not the Marion steam loader is a reasonably safe machine for the purpose of skidding in logs within a radius of five hundred feet from the track?"

Mr. ELDER.—Objected to as incompetent, irrelevant and immaterial and calling for an opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception. I think that is all.

Cross-examination.

(By Mr. ELDER.)

Q. Now, the slides and this Cody, and similar of these other machines that you have mentioned using, have two drums on them, don't they? A. Yes, sir.

Q. And a haul-back line can be placed on them at any time? A. Yes, sir.

Q. And you frequently did that to go out five hundred feet after logs?

A. We did it when we got out farther than five hundred feet.

Q. And you have done it for five hundred feet?

(Testimony of Thomas P. Jones.)

A. Not unless we had logs further than that and wanted it to go further.

Q. How far would you go with a small machine like a slide?

A. One thousand or fifteen hundred feet.

Q. And the slide works on a car, doesn't it?

A. Sometimes,—it frequently does; sometimes it doesn't.

Q. And the larger machines you work on the ground? [140] A. Yes, sir.

Q. The slides, you load the logs at the same time you pull them in? A. No, sir, you do not.

Q. You can do it if you want to?

A. We can do it if we are only skidding a short distance, but if we are using them as donkey, we don't, but if we are using them as a loader, we do.

Q. That is the difference between the equipment of those machines and the Marion, that is, the difference between the equipment of those machines and the Marion is that they are provided with apparatus for putting on a haul-back line if you desire to do so?

A. Yes, if you desire to use it for that purpose.

Q. And you can also place a whistle-cord or signal device on them, can't you? A. Yes, sir.

Q. And you can't use either of those on a Marion?

A. You could use a whistle-cord if the thing didn't turn around and around.

Q. As I say, it is so constructed that you can't use either of them?

A. No, it wasn't intended for that purpose.

Q. Now, you stated that this haul-back line was for

(Testimony of Thomas P. Jones.)

the purpose of hauling the main cable into the woods?

A. Yes, sir.

Q. Is that the only use for it?

A. The only use I ever knew it to be put to.

Q. Mr. Jones, isn't it a fact that logs coming in with a machine of that kind, equipped with a haul-back cable, all come in on the same general course?

A. All come in on the same general course after you get them into the road. [141]

Q. And they will run along the same track, won't they? A. Yes, unless they run out of it.

Q. What makes them do that?

A. The steady pull on them makes them do it, because the cable is leading them to one place all the time.

Q. Isn't it a fact, Mr. Jones, that if you don't have the haul-back line they won't run in the same track?

A. The haul-back line has no control over them whatever.

Q. Do you mean to tell this jury that in going out one thousand feet with a five-eighth inch cable and that line attached to a log which is being carried in, the weight of that line wouldn't have any effect in holding that log in a certain course?

A. No, sir; it would not.

Q. Can the engineer in running one of those machines control the haul-back line with a brake?

A. Oh, yes, you can control the haul-back line.

Q. Can't you, then, control the other line with that brake? A. Control the other line, yes, sir.

Q. And can stop the log, can't he? A. No, sir.

(Testimony of Thomas P. Jones.)

Q. Why not?

A. Well, I will tell you why. He uses the small line for a haul-back and the large line for a pulling line, and there is usually from twenty to twenty-five feet of the log hanging on what we call a choker, and a chain from twenty to twenty-five feet, that is attached in between where the two lines are attached. When we are skidding logs on a hill where they will run, we find our greatest trouble is to keep the log from unhooking as it runs ahead. Then if you pull up on the haul-back line most invariably they will unhook and [142] run ahead, run out of the rigging altogether, and they do anyhow, run off the road, unhook and run off the road, and when we are pulling they frequently take a shoot off that way,—twenty-five feet of loose cable there, they are liable to run in behind a stump.

Q. Do you mean, Mr. Jones, that some of those lines are not over six feet long?

The COURT.—Do you mean the choker lines?

A. Well, the chain is six feet long that we hook our chokers on to; our chokers are all made twenty feet long, and then we have tag lines from forty feet to seventy-five feet that we frequently use to bring them in out of the woods.

Q. When you use those tag lines to pull the logs in you then take the log off and fasten it on to the line? A. We most invariably do that.

Q. And with a line not over six feet long?

A. No,—our chokers are twenty feet long that we make. Our timber is small, as a rule, and we make

(Testimony of Thomas P. Jones.)

them twenty feet long. Where they skid larger timber, they make them longer.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all, Mr. Jones. [143]

[Testimony of A. C. Toms, for Defendant.]

A. C. TOMS, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. What is your name? A. A. C. Toms.

Q. Where do you live? A. Spokane.

Q. What is your business?

A. I am engineer at the McGoldrick Sawmill at Spokane, run a machine-shop and look after the machines in general.

Q. I will ask you to state what experience, if any, you have had in wood's work and logging operations.

A. Well, in wood's work, in the woods proper, I have never had any in this section of the country, other than to look after the machinery.

Q. How long have you looked after the machinery?

A. Why I have looked after machinery for various companies, while in the employ of the Union Iron Works, for the past ten years.

Q. How long have you been in the lumber business?

A. Three years past, that is, in this country.

Q. Well, altogether?

A. About eighteen or twenty years.

Q. Eighteen or twenty years in the lumber busi-

(Testimony of A. C. Toms.)

ness? A. Yes, sir.

Q. How much of that time have you been familiar, if at all, with skidding and loading machines?

A. About thirteen years.

Q. What kinds?

A. Various kinds, the McGifford, The Clyde and then the slides they tell about, equipped with a steam hoisting engine, and I have seen the Barnhart and the American. There are some [144] made over here in Washington by the Washington Machinery Company.

Q. Have you seen them operated and used for the purpose of skidding? A. Yes, sir.

Q. What did you see, at what places?

A. I saw them used over here at Lof Bay for the McGoldrick Lumber Company, and I saw them used over on the—I don't know as you would call that skidding—over here on the Coeur d'Alene branch that runs by—it is a branch that runs down to Bay View on Lake Pende O'Reille. Last year there was a lot of logs put in there by the farmers, I believe, and they were scattered over a considerable territory, and last spring we used a McGifford there and we went back after those logs as far as the road was extended.

Q. About what distance was that?

A. Well, I should judge in the neighborhood of four hundred feet.

Q. Have you seen them,—or was there a haul-back line on that? A. No, sir.

Q. Did you see these machines, or see any of them

(Testimony of A. C. Toms.)

in operation in any other part of the country?

A. I saw them on the Blackwell road or Idaho & Washington Northern, and I have seen them in operation in the Lumber Company out of Springdale.

Q. Any other places that you can think of?

A. We used them about fourteen or fifteen years ago in Minnesota.

Q. Have you seen them used for the purpose of skidding logs within a radius of five hundred feet?

A. Yes, I have.

Q. Are you familiar with the work of skidding logs in the woods?

A. I am familiar with how it is done. While I have never **[145]** had any thing to do with the skidding, I have always had to keep the machines in order and put them in order and I saw how they did this work.

Q. To what extent have you seen it done?

A. You mean the quantity?

Q. Oh, no, times, the number of times just approximately? A. Oh, two or three hundred times.

Q. You say the McGoldrick Lumber Company operates some of these machines?

A. How is that?

Q. Did you say the McGoldrick Lumber Company operates some of these machines?

A. The McGoldrick Lumber Company operated a Clyde over at Lof Bay and operated a McGifford and has been for the past six or seven years on the Idaho and Washington Northern or along their line, and the International.

(Testimony of A. C. Toms.)

Q. They use those for skidding?

A. I never saw them use them, not that particular one, for the purpose of skidding out of the woods, any more than the logs brought in by the farmers and scattered around.

Q. What distance out have you seen them used for skidding?

Mr. ELDER.—I submit your Honor, he says he hasn't seen them used.

A. Not that particular one.

Mr. SWAN.—Well, any of them?

A. I have seen them skid for four or five or six hundred feet. I didn't measure the distance, but from observation, about that distance.

Q. Did they operate them with a haul-back line?

A. No, sir.

Mr. SWAN.—You may take the witness.

Cross-examination.

(By Mr. ELDER.) **[146]**

Q. That was a Clyde and a McGifford and a Cody that you have seen work?

A. Well, I saw the American.

Q. Well, all those machines are equipped with a haul-back line aren't they?

A. They are equipped with two drums but not generally used with a haul-back line, generally used for moving cars. The Clyde pulls the cars through over the stops of the wheels, and the McGifford comes down on the ties and pulls the cars through under the wheels, and that line is generally used on the second drum for that purpose.

(Testimony of A. C. Toms.)

Q. But they do use them at times with a haul-back line? A. I have seen them; yes.

Q. And the distances are not more than five hundred feet?

A. I never saw a haul-back line strung out for a distance of five hundred feet in my life.

Q. You never did any work in the woods?

A. No, sir.

Q. You never helped operate any of these machines? A. I have operated them.

Q. Where?

A. For the McGoldrick Lumber Company, this side of what is called Bay View.

Q. How long?

A. For a few hours at a time probably, to see that the machine is in proper shape for turning it over to the workmen.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all, Mr. Toms. **[147]**

[Testimony of Norris P. Murphy, for Defendant.]

NORRIS P. MURPHY, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. What is your name? A. Norris P. Murphy.

Q. Where do you live? A. Bovill, Idaho.

Q. What is your business?

A. I am assistant superintendent in the woods there.

Q. Assistant superintendent of the woods?

(Testimony of Norris P. Murphy.)

A. Yes, sir.

Q. How long have you held that position?

A. About five years.

Q. How long have you been connected with the woods department of the Potlatch Lumber Company? A. About six and a half years.

Q. How long or how much experience have you had in logging, or logging operations in the woods?

A. Sixteen or seventeen years.

Q. At what places?

A. Minnesota, Michigan, Wisconsin and here.

Q. Minnesota Michigan, Wisconsin and out here?

A. Yes sir.

Q. Covering a period of sixteen years?

A. Yes, sir.

Q. I will ask you to state, Mr. Murphy, if you are familiar with what is known as the Marion steam loader. A. Yes, I am.

Q. And are you also familiar with other machines that have been mentioned here in this case, similar to that, the Cody, and McGifford and the American?

A. Yes, sir. **[148]**

Q. The slides? A. Yes, sir.

Q. And also a donkey, I suppose? A. Yes, sir.

Q. Have you seen a Marion steam loader or other loaders of a similar character in operation?

A. Yes, sir.

Q. At what places?

A. I have seen them at the Potlatch, in Wisconsin, Smith & Company, Duluth, Marshall M. E. Lumber

(Testimony of Norris P. Murphy.)

Company at Duluth, Hines Lumber Company, Wisconsin.

Q. Any other places in Wisconsin?

A. Yes, Murphy & Sons, Green Bay.

Q. Where else?

A. Hermesville Lumber Company, Hermesville, Michigan.

Q. What places, if any, out in this part of the country? A. None here, only the Potlatch.

Q. I will ask you to state whether or not at any of those places they used those machines for the purpose of skidding logs within a radius of five hundred feet.

Mr. ELDER.—I object to that as not a proper question. The question is whether they are in general use. Any one place wouldn't be the question.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. Yes.

Q. What places? A. Pretty near all of them.

Q. Were they at those different places used for skidding logs within a radius of five hundred feet?

A. Yes, sir.

Q. How many of them approximately?

A. Well, you might as well say all of them. **[149]**

Q. Do you think practically all of those places?

A. Yes, sir.

Q. Is there any place you know of that you have mentioned that they didn't use them?

A. No, no place I know of.

Q. In what respect, if any, does the Marion loader

(Testimony of Norris P. Murphy.)

differ from those others in regard to operating as a skidding machine?

A. All the difference there is in the Marion from the slides and McGifford and Cody's is that the Marion turns around and they are stationary.

Q. Aside from that, they are operated on the same principle?

A. Same principle exactly, and answer the same purpose.

Q. Now, the times that you saw these machines used for the purpose of skidding in these logs within a radius of five hundred feet, state whether or not they were operated by or with a haul-back line.

A. No.

Q. Now, from your experience, which you say has covered fifteen or sixteen years? A. Yes, sir.

Q. In various parts of the country?

A. Yes, sir.

Q. From your experience, I wish you would state whether or not it is customary in skidding in logs for a distance of five hundred feet from the track to use a haul-back.

A. No, it is not, not with the loader, where you are loading them.

Q. Well, any of those machines, I mean. A. No.

Q. What is the purpose of a haul-back? **[150]**

A. The purpose of a haul-back is to haul the big cable back in the woods after your timber.

Q. "Now, Mr. Murphy basing your answer and opinion upon your own experience and observation, covering a period of sixteen years, I will ask you to

(Testimony of Norris P. Murphy.)

state whether or not the Marion loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet."

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and calling for the opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Q. How long, Mr. Murphy, has the Potlatch Lumber Company been using Marion steam loaders and other loaders of a similar character for skidding in logs within a distance of five hundred feet?

Mr. ELDER.—Objected to as not binding upon this plaintiff, Mrs. Harkins.

The COURT.—Overruled.

A. They were using them as I came here and they have used the Marion ever since they got them.

Q. You say since you came there,—six or seven years ago?

A. Yes, they were using the other loaders when I came there for that purpose.

Q. Were they equipped with a haul-back, or *with* they operated with a haul-back, while skidding in within that radius?

A. Not when they were loading.

Q. Or for skidding short distances? A. No.

Mr. SWAN.—I think that is all.

Cross-examination.

(By Mr. ELDER.) [151]

Q. You say you never saw one of those machines skidding with a haul-back five hundred feet, four or

(Testimony of Norris P. Murphy.)

five hundred feet? A. No, sir.

Q. Did you ever operate a machine of that class yourself? A. I have operated them all, yes, sir.

Q. For the company here?

A. For this company and for others.

Q. In what capacity?

A. Top loaded on them and hooked on them.

Q. Did that while you was assistant superintendent? A. Well, sometimes a carload or so—

Q. Now, there aren't any of those machines that you mentioned that are exactly like the Marion steam loader? A. Not in appearance; no.

Q. Well, in construction, in general construction, I mean? A. No, not in construction.

Q. They all have a stationary boom, don't they?

A. Yes.

Q. And they are equipped with two drums?

A. Yes.

Q. And those drums can be used for a haul-back cable, if you so desire? A. Yes.

Q. And they are used at times for the purpose of skidding out a haul-back? A. Yes, sir.

Q. And when you are not loading and are using your machine for the purpose of skidding, you do use the haul-back too, don't you? A. Yes, sir. [152]

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. Within what distance?

A. Up to fifteen hundred, sixteen hundred, or seventeen hundred feet.

(Testimony of Norris P. Murphy.)

Q. Did you ever use it within a radius of five hundred feet? A. No.

Q. I will ask you to state whether or not it is practicable to rig up a haul-back and use that in skidding in logs within a radius of five hundred feet.

A. No, it wouldn't be, I don't think.

Q. What is that? A. I don't think it would.

Mr. SWAN.—That is all.

Recross-examination.

(By Mr. ELDER.)

Q. You mean to say, Mr. Murphy, if you had a bunch of logs scattered over a hillside, and the logs further away were five hundred feet, it wouldn't be feasible to put your haul-back line on to bring those logs in?

A. No, not if those logs were right by the machine; of course, if you were going back five hundred feet for the first of the logs, it might be.

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. If you had to go five hundred feet back into the woods, would you rig up a haul-back for the purpose of going out just that five hundred feet and getting that bunch of logs? A. No, sir.

Q. Is it customary to do so? [153] A. No.

Mr. SWAN.—That is all. [154]

[Testimony of Michael J. Ward, for Defendant.]

MICHAEL J. WARD, a witness duly called and sworn on behalf of the defendant, testified as follows, on

(Testimony of Michael J. Ward.)

Direct Examination.

(By Mr. SWAN.)

Q. State your name to the reporter.

A. Michael J. Ward.

Q. Where do you live? A. Coeur d'Alene.

Q. How long have you lived here?

A. I have lived here in Coeur d'Alene City two months, but I have been here about nine years.

Q. What is your business?

A. Well, I have been superintendent for the Blackwell Lumber Company in the woods department at Mica Bay for four years.

Q. What experience have you had in logging operations? I will first ask you how long you have been engaged in logging operations.

A. Twenty-five or thirty years. That is all I have ever done.

Q. Were you in the woods during that time?

A. Mostly all the time.

Q. Where?

A. Well, all the way from Michigan to Coeur d'Alene City, from Saginaw, Michigan.

Q. In a number of different localities, or only a few? A. Well, not very many.

Q. Well, about how many? A. About five.

Q. Can you name them?

A. Saginaw would be one, and Bangaw on the upper peninsula would be the second one. Superior and Duluth would be the third. [155] Grand Rapids would be the fourth and Coeur d'Alene,

(Testimony of Michael J. Ward.)

Idaho, would be the fifth, and in British Columbia for one winter.

Q. That covers a period of some twenty-five or thirty years, you say?

A. Yes, sir, about thirty years.

Q. Are you familiar, Mr. Ward, with logging operations in those various places?

A. Pretty well, yes, I think so.

Q. Are you familiar with what is known as the Marion loader and other machines of a similar character?

A. Not very with the Marion; I am with others.

Q. Do you know what a Marion is?

A. Yes, I have seen them working.

Q. Do you know or are you familiar with, other machines of a similar character? A. Yes.

Q. Loaders? A. Yes.

Q. Now, have you ever seen, or do you know of those Marion loaders or machines of a similar character being used for the purpose of skidding logs within a radius of five hundred feet?

A. Yes, I do.

Q. Where?

A. Well, most any of the last three places I have mentioned, through Minnesota, but not back as far as Michigan, because I never knew of any back in that country.

Q. You never knew of any back there?

A. No, sir.

Q. How long have you known of these machines to be in operation in that kind of work?

(Testimony of Michael J. Ward.)

A. I believe the first one I saw was in '92. [156]

Q. Now, at the times that you have seen these machines, or operated them or observed their operation, were they used with a haul-back line?

A. I never saw one, not while they were used for loading.

Q. Within a radius of five hundred feet?

A. Not when they were using them for loading.

Q. For skidding five hundred feet? A. No.

Q. I will ask you to state whether or not, from your experience in logging operations, it is customary in skidding logs within a radius of five hundred feet to use a haul-back.

A. No, I never saw one used, not on a loader machine.

Q. What is the purpose of a haul-back?

A. Well, a haul-back is to transfer a large line back into the woods, you know, so as to get logs for a greater distance than what a loader would go to; that is, on a donkey, where you go back two or three thousand feet, they use haul-backs, because the cable is too heavy.

Q. Is it practicable to equip a machine for the purpose of skidding in logs within a radius of four or five hundred feet with a haul-back? A. No.

Q. Now, you say you are familiar with these loading machines such as have been described here?

A. Yes, I am pretty familiar with them, outside of the Marion. I have just seen them working; I never worked on them.

Q. You have seen a Marion?

(Testimony of Michael J. Ward.)

A. Yes, I have seen them working.

Q. And the principle is practically the same as on the others, the operations?

A. Yes, practically the same. [157]

Q. What did you say?

A. It is about the same, only it is a swinging boom.

Q. A swinging boom?

A. It is a swinging machine.

Q. You mean the boom swings around, revolves?

A. Yes, the machinery is practically the same.

Q. And the manner of operation is practically the same? A. Just the same, yes.

Q. "Now, basing your answer or your opinion upon your twenty-five or thirty years' experience in the woods, in logging operations, and your knowledge and observation of machines similar to the Marion, I will ask you to state whether or not, in your opinion, those machines are reasonably safe for the purpose of skidding logs within a radius of five hundred feet."

Mr. ELDER.—Objected to as incompetent, irrelevant and immaterial, and calling for an opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—Note an exception. Take the witness.

Cross-examination.

(By Mr. ELDER.)

Q. The machines you work with are all equipped with two drums? A. Yes, sir.

Q. And that second drum can be used for a haul-

(Testimony of Michael J. Ward.)

back? A. Yes, sir, it can.

Q. And it is used for a haul-back when skidding with the machine? A. When skidding.

Q. When they are not loading?

A. When you are not loading, you can use it for a haul-back, yes. [158]

Q. And then you do use it?

A. Yes, if you are skidding, you can use it if you need it.

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. I think you said, Mr. Ward, that the purpose of a haul-back was to carry the tackle out into the woods after the logs had been hauled in, where they had to go away back a long distance?

A. To transfer the big line, on a donkey, or something like that, to haul the big line back, the heavy line.

Q. Is it used for the purpose of steadying logs as they are dragged in? A. I never knew it to be.

Q. You say you never knew it to be used for that purpose?

Mr. SWAN.—I think that is all.

Recross-examination.

(By Mr. ELDER.)

Q. Did you ever operate a machine yourself, Mr. Ward? A. Run the engine?

Q. Yes. A. Well, I have hold of them, yes.

Q. Did you ever operate them, though?

(Testimony of Michael J. Ward.)

A. I have had hold of them and run them to put in a log, but not steady.

Q. You mean you have merely taken the engineer's place for a few minutes?

A. Yes, just for a while, maybe for a half hour, or something like that.

Q. If you was skidding logs and going more than five hundred feet, after you got within the five hundred feet, would you take your haul-back line off and haul the next of the logs in without it? [159]

A. Well, on some occasions they do; it depends upon the ground and depends on a good deal.

Q. You can take the line back a great deal faster with a haul-back than you can by hand, can't you?

A. If it is already hung up—

Q. And it only takes a few minutes to string it up, doesn't it?

A. Well, I don't know hardly how I would answer that question.

Q. Well, it doesn't take but a short space of time to put it into place?

A. How much would you have to but in place?

Q. Five or six hundred feet?

A. Well, it would take quite a little while to string out five or six hundred feet.

Q. It takes four men to run it without the haul-back being on, doesn't it?

A. Well, it takes the same men, I think, about the same men; I don't think it makes any difference in the man.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all.

Defendant rests.

Mr. ELDER.—That is all.

The COURT.—Gentlemen, do you want to argue this case this evening?

Mr. SWAN.—I would rather not. I desire to make a motion and would like the permission of the Court to argue the motion to some extent, at least. If it is convenient for the Court, I would like to start in at a quarter past nine, to-morrow.

Mr. ELDER.—I would much prefer, your Honor, to submit the case to-night, if it is possible, because we are pretty busy and have some other cases coming up in the other courts. If it is possible. I [160] don't want to inconvenience counsel, but if it is possible to submit it to-night, I would much prefer to do that.

Mr. SWAN.—I am not prepared to stay over here to-night unless it is absolutely necessary. I would like to go back on the five thirty-five train and be here again in the morning at nine o'clock. I don't like to insist upon it or inconvenience the Court in any way, but I do feel as though—

The COURT.—The only difference is that if we let it go over until to-morrow morning we may be without a jury for the rest of the day; that is the only reason I would have to prefer that it be submitted to-night. However, counsel has been here a fairly long day, and I don't like to insist upon it.

Mr. SWAN.—I would like very well to have it go over, if the Court could accommodate me in that way. I would very much prefer to go home this evening, as I have some matters that I really ought to attend to this evening.

Mr. ELDER.—The train, I think, leaves at six thirty-five and we could submit it prior to that time.

Mr. SWAN.—I don't like to be placed in a position where I can't argue this matter, your Honor. I desire to be heard upon that.

The COURT.—Gentlemen of the Jury, you may be excused until nine-thirty to-morrow morning. I will hear your motion now, Mr. Swan.

The jury thereupon retired from the courtroom.

The COURT.—That is, if you can submit it in half an hour. I don't want to interfere with your return to Spokane. At least I will hear you for a time.

[Motion of Defendant for Instructed Verdict.]

Mr. SWAN.—If the Court please, the testimony being all in, and defendant and the plaintiff both having rested, defendant moves the Court to instruct the jury to bring in a verdict for the defendant, for the **[161]** reason and upon the grounds that the plaintiff has failed to show any actionable negligence or any negligence of any kind upon the part of the defendant, whereby the deceased met his death; that the evidence shows conclusively that the defendant was guilty of no negligence whatever in the premises, and that the accident was due solely and alone to an accident which could not have been foreseen or anticipated; that the evidence further shows that the

Marion steam loader was a reasonably safe machine for the purpose for which it was being used at the time, and that it is a machine which is in general use throughout the country; that the evidence further shows that the deceased, in entering in, upon and remaining in the employment of the defendant in the work in which he was engaged at the time, assumed all risks and dangers incident to the operation of the machine in the manner in which it was being operated at the time. The evidence fails to show that there was anything defective about the machine, but, upon the contrary shows that it was in good and proper condition, and that the accident, if due to the negligence of anyone, was caused by the negligence of the deceased's fellow-servant. In cases of this kind, of course, the plaintiff must prove negligence, and, failing to show any negligence on the part of the defendant, there is nothing on which the jury would be permitted to base a verdict or guess in cases of this character. The facts in this case only go to this extent; they allege in their complaint that we used a Marion steam loader, which was not adapted or suitable for the purpose for which it was being used at that time, and there isn't one word of testimony in this case that that machine was not a suitable machine for that purpose, nor one word that it was not adapted for that purpose.

(Argument of motion by counsel.)

[Order Denying Motion of Defendant for Instructed Verdict.]

The COURT.—Gentlemen, as I view the record here, there [162] is some evidence tending to show

a departure from custom, referring to the phraseology of the last case, which is doubtless well reasoned, that is, there were several witnesses upon behalf of the plaintiff whose testimony tends to show that this device or machine was designed for the purpose of loading logs from points near the cars upon which they are being loaded, and was not intended to be used for the purpose for which it was being used at the time of this unfortunate accident,—testimony from which it at least inferentially appears that it was not equipped with the ordinary devices which accompanied skidding machines, strictly speaking. Now, the evidence goes further and tends also to show the other element referred to in this last case, and that is that this departure was attended with greater hazard than the customary way. Just what weight we should give to this evidence is another question, and a question for the jury, and not for the Court. That evidence is to the effect that where the customary method as contended for by the plaintiff, is followed, viz., a skidding machine with a haul-back line and a signal wire or cord, or especially the haul-back line, that this haul-back line may be used and is used for the purpose of steadying the moving log and keeping it within range of a certain line or course, and that it cannot swing so far or so readily from the course upon which it is being drawn. I can only say in addition to this that the impression made upon me by the evidence for the plaintiff, when the plaintiff closed her case, was that the defendant had been negligent. If the testimony on behalf of the defendant is to be credited, it was not negligent. Its

testimony very strongly tends to show that it was not negligent, and if the jury believes it, of course, they should find for the defendant, but it is for the jury to say upon which side the truth lies in that respect. For that reason the motion will be denied. [163]

Mr. SWAN.—Allow us an exception.

The COURT.—Yes.

Mr. SWAN.—Do we begin at half-past nine to-morrow?

The COURT.—Yes.

An adjournment was thereupon taken until 9:30 A. M. Saturday, November 22, 1913. [164]

At 9:30 A. M., Saturday, November 22, 1913, the Court resumed its session and the following proceedings were had, to wit:

(Argument of case to jury.)

Instructions to Jury.

The COURT:

Gentlemen of the Jury, as you have already learned, this action is brought by Susan Harkins against the Potlatch Lumber Company, for the purpose of recovering from the Lumber Company, the sum of twenty-five thousand dollars damages, which she claims she has suffered because of the death of her husband while he was employed by the defendant company in its logging operations in this State. Most of the incidental questions involve no dispute or controversy of fact. In other words, it is admitted that Mrs. Harkins is the surviving widow of the deceased, and that she is the only heir, and therefore, under the statutes of the State, she has a right to maintain the action, the general rule of law in that

respect being that where one has been killed through the wrongful conduct of another, or the wrongful conduct of the employees of another person or corporation, the surviving heirs may recover damages from the person guilty of the wrong, or the employer of such person. The gist of the action, or controlling issue, involves the question of negligence. In other words, the plaintiff here relies, and must rely, upon her charge in the complaint that the defendant, through its agents and employees was guilty of negligence, and that negligence resulted in the death of Mr. Harkins. In no view of the case can you find in favor of the plaintiff, unless you find, first, that the defendant was negligent, substantially in the manner alleged in the complaint, and second, that the death of Mr. Harkins was due to such negligence.

There is, as I will explain to you further along, **[165]** still another question, and that is as to whether or not the deceased assumed the risk of the danger. If he did so assume the risk, the plaintiff here could not recover, even though the defendant was negligent as alleged.

I may say to you that in general negligence may be defined in this way: It is the doing of something which an ordinarily intelligent and prudent person, would not, under like circumstances, do, having regard for the rights of others, or the leaving undone, under such circumstances, of something which an ordinarily prudent person, having regard for the rights of others, would do. You see, it may be either positive or negative. If you do something which an ordinarily prudent person would not do, that is posi-

tive negligence. If you leave undone something which you ought to do, because an ordinarily prudent person would have done, then you are guilty of negative negligence.

The particular or specific negligence charged in this case is that while the deceased was in the employ of the defendant, engaged in logging operations, it put him to work with an appliance, or directed him to assist in a method which was not suitable for carrying on such operations; more specifically, that it used what is referred to in the record as a Marion log loader, which the plaintiff contends is designed only for loading logs, and not for skidding them, and that the loader is not adapted and suitable for skidding logs, for the reason that it is not provided with any signal device, and, second, that it is not provided with what is referred to as a haul-back. Those are the specific issues. It is denied by the defendant that the Marion loader is not suitable for this purpose, and it is denied that the method employed at the time and the device used are more dangerous than other devices, and it is further contended, as you have heard, that this machine and machines of a similar character, working upon like principles, [166] are in common use in logging operations throughout the State here, and indeed in other States. Now, as I have already indicated to you, it is necessary for you to find that the defendant was negligent substantially in the manner charged in the complaint, before you would be warranted in finding a verdict in favor of the plaintiff in any view that you may take of other features of the case. And furthermore, if you

should find that the defendant was negligent as charged, you cannot find in favor of the plaintiff and award to her any damages if you should further find under the general instructions which I shall give to you upon that subject that the deceased assumed the risk of his employment, that is, was aware of the devices and methods which were being employed at the time, and appreciated the danger therefrom. I will explain that a little more fully to you. In other words, you must find, before you can find in favor of the plaintiff, that the defendant was negligent and that the deceased did not assume the risk of the employment. I may say to you, Gentlemen, that no presumption of negligence on the part of the defendant arises from the mere fact that Mr. Harkins was killed or that this accident occurred. You are all men of experience, and some of you, I think, stated upon your examination touching your qualifications to serve as jurors that you are experienced as woodsmen; but however that may be, you will all understand that there are dangers of one kind or another necessarily incident to an employment of this kind, as there are dangers incident to almost all employments, and, therefore, we have what are sometimes called unavoidable accidents, accidents that no reasonably prudent person could anticipate, and for which no one is morally responsible. Sometimes in the simpler walks of life, the least hazardous vocations of life, accidents occur. So I say that you have no right to infer that the defendant was negligent merely because an accident occurred and Mr. Harkins was killed as a consequence [167] thereof.

Nor does it necessarily follow that the method and device here used were improper because this particular accident might have been avoided, if some other method or appliance or device had been used. "To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened; still that method might have been attended with danger of other accidents, that is, accidents of a different kind; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question would still remain whether this method is more hazardous (and unreasonably hazardous) than the method of skidding logs by the use of horses.

So, referring to the matter of using a signal device and a haul-back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely: whether this method was more hazardous than the other referred to, namely: the haul-back." It seems that in using the haul-back line it is necessary, for instance, to draw in logs by the use of temporary lines (I have forgotten just what the name was), to haul them in from some distance, to the main line. Is that process accompanied with dangers? Are the dangers of that method greater or less than the dangers of this method?

Now, I refer to these considerations in order to direct your attention to the rule which prevails in cases of this character, and in order also to impress you with its reasonableness. That rule is this, the duty of the employer, here the Potlatch Lumber Company (and I state it to you in a general way, and then you will apply it to the particular facts), the measure of the employer's duty is to exercise ordinary and reasonable [168] care to supply the employee with appliances and places and methods of work which are reasonably safe, but not necessarily always the newest or safest appliances. Sometimes it is not definitely known whether a very new appliance is going to turn out to be safe or not. Not extraordinary safeguards, but such as men of reasonable intelligence and prudence, and possessed of due and ordinary regard for the safety of life and limb, employ or would employ. Some men may employ one method and some another. Some men may think one method a little safer than another. It doesn't follow that either one is negligent because different methods are employed. The question is whether any of them are using a method or using a device which intelligent men, reasonably prudent men, who have ordinary and reasonable regard for the safety of others, are using. If they use such a method, that is, one that is reasonably adapted to protect from danger or against danger, then there is no negligence, even though some other man might employ another method, even though it is not entirely clear which is the better of the two. So your inquiry here should be, did the defendant, in employing the Marion

loader, under the conditions under which it was employed, for the purpose for which it was used at that time, exercise such intelligence, prudence and regard for the safety of its employees as men of ordinary intelligence and prudence, and with regard for the safety of others, ordinarily employ and exercise? Now, if you should find that the defendant was not negligent under those rules which I have laid down for you, your duty is at an end, and you should return a verdict for the defendant. If, upon the other hand, you find that it was negligent, then you should pursue your inquiry further, and a necessary question is, whether or not Mr. Harkins assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point, I advise you as follows: [169]

It is the general rule that an employee cannot recover damages for an injury resulting from the negligence of the employer, where the conditions constituting such negligence are known to the employee, or are obvious and plainly observable by him; provided further also, the peril therefrom is appreciated by him, or is clearly apparent. The reason or principle upon which this rule rests is that where one continues in the employment under conditions of which he is aware, and the dangers from which he understands, he thus impliedly consents or agrees to work under such conditions and himself to assume the risks and hazards thereof. Under this rule, if you find here that Mr. Harkins appreciated the dangers of logging or skidding logs in the manner and with the device employed at the time of the accident,

and though having such knowledge and appreciation continued in such employment, then you must further find that he assumed the risk, and the plaintiff cannot recover. The evidence leaves no doubt that he had knowledge of the manner in which the skidding was being carried on, and the only question upon this branch of the case is whether his experience and intelligence were such as to enable him to appreciate and that he did appreciate, the dangers therefrom. If you should find that the defendant was negligent, and that Mr. Harkins did not assume the risks, then there is still the further question for you, and that is, the amount of the damages which you will award to this plaintiff. She will be entitled to recover damages from the defendant, and it will be for you to consider what amount should be awarded. The statute has fixed no precise or specific rule, and it is left to the reasonable discretion of the jury to fix the amount, in the light of all the circumstances in evidence in the case. You will consider here the age of Mr. Harkins at the time the accident occurred, his vocation, his physical condition, the amount which he was capable of earning, or was likely to earn, his relation to the **[170]** plaintiff as her husband, and all other circumstances in evidence, and you will award to her such amount as in your judgment you think she is entitled to, based upon those circumstances and relations.

It is necessary for all of you, Gentlemen, to concur in a verdict. In the State court three-fourths of you can do so, but here, all of you must agree.

Two forms of verdict have been provided, one of

which is simply for the defendant; in case you find for the defendant, your foreman will sign that form. In the other case, a blank is left after the words "sum of" in which you will enter the amount which you award to her. After making such entry, your foreman will sign the verdict.

Mr. SWAN.—I think the Court perhaps inadvertently overlooked instructing the jury as to the burden of proof in the case.

The COURT.—Yes. The burden of proof in a case of this kind is upon the person who asserts the existence of a fact, so that the burden of proof is upon the plaintiff to show that the defendant was negligent in the manner and form alleged; and she must show that by a preponderance of the evidence. Upon the other hand, the burden is upon the defendant to show that Mr. Harkins assumed the risk of the employment, and the defendant must show that by a preponderance of the evidence, if it would succeed. In either case, a preponderance of the evidence is not evidence convincing you beyond a reasonable doubt, but simply a greater weight of the evidence, that which, under the circumstances convinces your judgment.

The COURT.—Gentlemen, you may take your exceptions.

[Exceptions to Instructions.]

Mr. SWAN.—The defendant excepts to that portion of the Court's instructions which stated that the question for the jury to decide was whether the use of the Marion steam loader, as it was being used at the time of this accident, was more hazardous than if

used with a haul-back. [171]

The COURT.—Did I state that?

Mr. SWAN.—You used those very words. I wrote them down—more hazardous than with a haul-back. It was about halfway through your instructions.

Mr. ELDER.—I didn't so understand.

The COURT.—I can't believe that the jury would get that impression, that that was the instruction; I think I shall leave it as it is.

Mr. SWAN.—Very well, allow the defendant an exception.

The COURT.—Do you desire to take any exceptions, Mr. Elder?

Mr. ELDER.—No.

Administer the oath to the bailiff, Mr. Clerk.

(Bailiff sworn.)

The COURT.—Gentlemen, you may retire.

(Jury retired from courtroom in charge of bailiff.)

Whereupon the jury retired and after an absence returned into court on the 22d day of November, 1913, with a verdict in favor of plaintiff for damages in the sum of $5,000.00 against the defendant. Thereafter and within the time allowed by law defendant moved the Court for a new trial in said cause, which motion came on regularly for hearing before the Court upon the 2d day of December, 1913, both parties being present and represented by their respective counsel, and which motion was by the Court denied, to which ruling defendant by its attorney then and there excepted and exception was allowed. Whereupon and thereafter and on the 22d

day of November, 1913, judgment was rendered and entered upon said verdict in favor of plaintiff and against defendant for $5,000.00, the total amount of [172] said judgment being said sum of $5,000.00 and $——— costs and disbursements, and now in furtherance of justice and that right may be done, defendant presents the foregoing as its bill of exceptions in this cause and prays the same may be settled and allowed and filed and certified by the Judge as provided by law and the practice of this Honorable Court.

CANNON, FERRIS & SWAN,
BLACK & WERNETTE,
Attorneys for Defendant. [173]

United States District Court for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Admission of Service [of Bill of Exceptions, etc.].

Service of the within prepared Bill of Exceptions is hereby admitted this 13th day of January, 1914; and it is agreed that the same may be settled and certified as herein prepared without further notice.

ELDER & ELDER,
Attorneys for Plaintiff.

[Order Allowing Bill of Exceptions.]

Allowed as the defendant's Bill of Exceptions.

FRANK S. DIETRICH,
Judge.

January 24, 1914.

Filed January 26, 1914. A. L. Richardson, Clerk.

[174]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named defendant, Potlatch Lumber Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States District Court for the District of Idaho, Northern Division, at the November term thereof, 1913, manifest error hath happened to the great damage of this defendant.

Your petitioner further respectfully shows that it

has this day filed herewith its Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the defendant prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said case; and for such other orders and process as may cause the same to be corrected [175] by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 13th day of January, 1914.

CANNON, FERRIS & SWAN and
BLACK & WERNETTE,
Attorneys for Defendant.

[Order Granting Petition for Writ of Error.]

Granted.

FRANK S. DIETRICH,
Judge.

January 24, 1914.

Due service of within Petition by receipt of a true copy thereof admitted this 13th day of Jan'y, 1914.

ROBT. H. ELDER,
ED. ELDER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 24, 1914. A. L. Richardson, Clerk. [176]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error (and Fixing Amount of Bond).

The defendant Potlatch Lumber Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit; and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said defendant, Potlatch Lumber Company, filing with the Clerk of this court a good and sufficient bond in the sum of Six Thousand ($6,000) Dollars, payable to Susan Harkins, plaintiff in the above-entitled

cause to the effect that if the said defendant Potlatch Lumber Company, and plaintiff in error shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the obligation [177] to be void, otherwise to remain in full force and effect, the said Bond to be approved by the Court; that all further proceedings in this suit be, and they are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 24th day of January, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. [178]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Assignments of Error.

Comes now the Potlatch Lumber Company, defendant in the above-entitled action, and makes and files the following assignments of error, upon which said defendant and plaintiff in error will rely in the

Circuit Court of Appeals of the United States for the Ninth Circuit, for relief from and a reversal of the judgment rendered in said cause in the court below, to wit:

I.

The Court erred in refusing to permit the defendant to ask the witness Harry Younkin, and require him to answer whether or not the work was not being done at the time in question in the most practicable, customary and usual manner, to which ruling of the Court the defendant excepted and its exception was allowed.

II.

The Court erred in refusing to permit the defendant to ask the witness Harry Younkin, and require him to answer whether or not, in his opinion, the use of the Marion loader was any more dangerous, under the circumstances, than if a slide had been used, to which ruling of the Court defendant excepted and its exception was allowed.

III.

The Court erred in refusing to permit the witness E. M. [179] Rogers to state whether or not the Marion steam loader was a reasonably safe machine for the purpose for which it was being used, to which ruling of the Court defendant excepted and its exception was allowed.

IV.

The Court erred in refusing to permit the witness E. M. Rogers to answer the following question propounded by defendant to said witness:

"Q. Mr. Rogers, the testimony in this case tends

to prove that the Potlatch Lumber Company, the defendant, was using a Marion steam loader, with a five hundred foot five-eighths inch cable, and that they were skidding logs, or hauling in logs from various directions, a distance of between three and four hundred feet with this machine, that the log started to roll down a hill, and struck a tree, knocking it down, a dead tree, knocking it down and killing the deceased. I will ask you to state whether or not, basing your answer upon your experience in the woods and your logging business, and your knowledge of the conditions, if that work was being done in a reasonably safe and customary manner."

To which ruling of the Court defendant excepted and exception was allowed.

V.

The Court erred in refusing to permit the witness E. M. Rogers to answer the following question propounded by defendant to said witness.

"Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose."

To which ruling of the Court defendant excepted and its exception was allowed. [180]

VI.

The Court erred in refusing to permit the witness R. M. Hart to answer the following question propounded by said defendant to said witness:

"Q. I will ask you, Mr. Hart, whether or not

the Marion steam loader, or one of a similar character, is in general use throughout the country for the purpose of skidding logs within a radius of five or six hundred feet."

To which ruling of the Court defendant excepted and its exception was allowed.

VII.

The Court erred in refusing to permit the witness R. M. Hart to answer the following question propounded by defendant to said witness:

"Q. I will ask you to state whether or not from your experience and observation, those machines are reasonably safe for the purpose of skidding in logs within a radius of five hundred feet."

To which ruling of the Court defendant excepted and exception was allowed.

VIII.

The Court erred in refusing to permit the witness Thomas P. Jones to answer the following question propounded by said defendant to said witness:

"Q. Now, from your knowledge and experience of thirty years in the logging business, I will ask you to state whether or not the Marion steam loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet from the track."

To which ruling of the Court defendant excepted and its exception was allowed. [181]

IX.

The Court erred in refusing to permit the witness Norris P. Murphy to answer the following question propounded by defendant to said witness:

"Q. Now, Mr. Murphy, basing your answer and opinion upon your own experience and observation, covering a period of sixteen years, I will ask you to state whether or not the Marion loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet."

To which ruling of the Court defendant excepted and its exception was allowed.

X.

The Court erred in refusing to permit the witness Michael J. Ward to answer the following question proponded by defendant to said witness:

"Q. Now, basing your answer or your opinion upon your twenty-five or thirty years' experience in the woods, in logging operations, and your knowledge and observation of machines similar to the Marion, I will ask you to state whether or not, in your opinion, those machines are reasonably safe for the purpose of skidding logs within a radius of five hundred feet."

To which ruling of the Court defendant excepted and its exception was allowed.

XI.

The Court erred in refusing to grant defendant's motion to direct a verdict for defendant made at the close of all the testimony in the case, which motion was based upon the ground that the plaintiff had failed to show any actionable negligence or any negligence whatever on the part of the defendant, and that the evidence shows conclusively that the death of deceased was due solely and alone to an accident which could not have [182] been foreseen

or anticipated, and that the evidence shows that a Marion steam loader was a reasonably safe machine for the purpose for which it was being used, and that it is a machine which is in general use throughout the country, and that the deceased in entering upon and remaining in the employment of the defendant in the work in which it was engaged, assumed all risks and dangers incident to the operation of the machine in the manner in which it was being operated at the time. To which ruling of the Court defendant excepted and its exception was allowed.

XII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant for the reason and upon the grounds and each and all of them as stated in Assignment of Error XI, to which ruling of the Court defendant excepted and its exception was allowed.

XIII.

The Court erred in giving to the jury the following instruction:

"To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question still remains whether this method is more hazardous and unreasonably hazardous, more hazardous than

the method of skidding the logs by use of horses.

So, referring to the matter of using a signal device and a haul-back line, possibly this particular accident might [183] have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul-back."

To the giving of which instruction defendant excepted and its exception was allowed.

XIV.

The Court erred in entering judgment upon the verdict of the jury in favor of plaintiff for the reason and upon the grounds and each and all of them as stated in Assignment of Error No. XI, to the entering of which judgment defendant excepted and its exception was allowed.

The defendant duly excepted to the rulings of the Court in the matter of each of the above errors assigned, and hereby and now assigns each and every one of said rulings as error.

CANNON, FERRIS & SWAN,
BLACK & WERNETTE,
Attorneys for Defendant.

Due service of within Assignments of Error by

receipt of a true copy thereof admitted this 13th day of Jan'y, 1914.

ROBT. H. ELDER,
ED ELDER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 24, 1914. A. L. Richardson, Clerk. [184]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Potlatch Lumber Company, a corporation, as principal and the Fidelity & Deposit Company of Maryland, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do business as a surety company in the State of Idaho, are held and firmly bound unto Susan Harkins in the full and just sum of Six Thousand ($6,000) Dollars, to be paid to the said Susan Harkins, her heirs, executors, administrators, legal representatives or assigns to which payment well and truly to be made we bind ourselves, our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of January, 1914.

WHEREAS, lately, in the District Court of the United States for the District of Idaho, Northern Division, in an action pending in this court between Susan Harkins as plaintiff, and the Potlatch Lumber Company, a corporation, as defendant, a judgment was rendered in favor of said plaintiff and against said defendant for the sum of Five Thousand ($5000) Dollars, and costs of action, and said Potlatch Lumber Company has [185] obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a citation directed to the above-named plaintiff citing and admonishing her to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Potlatch Lumber Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

POTLATCH LUMBER COMPANY.

By———————

Its Attorneys.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By W. L. BERRY,
Attorney in Fact.

[Seal] Attest: HARRY E. RICH,
General Agent.

Coeur d'Alene, Idaho, 13th day of Jan'y, 1914.

O. W. CHAMBERLAIN,
Coeur d'Alene, Idaho.

Approved. FRANK S. DIETRICH,
Judge.

January 24, 1914.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. [186]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order Directing Transmission of Original Exhibits.

This cause came on duly and regularly for hearing on this 26th day of Jan., 1914, upon motion by appellant for an order directing the Clerk of this court to send to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the original exhibits in the above-entitled cause, under his certificate that the same are such originals, the Court being fully advised in the premises, it is hereby ORDERED that the Clerk of this Court be, and he is hereby directed to send to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, under his certificate that the same are originals, the following exhibits:

1. Plaintiff's Exhibit No. 1.

Done in open court this 26th day of January, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. **[187]**

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-named Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the Writ of Error to be perfected to said court, and include in said transcript the following proceedings: Pleadings, papers, records and files, to wit:

Summons;

Complaint;

Answer;

Verdict;

Order of November 28th, 1913, Extending Time to File Bill of Exceptions and Granting Stay of Execution;

Judgment;

Petition for New Trial;
Order Denying Petition for New Trial;
Petition for Writ of Error;
Order Allowing Writ of Error and Fixing Amount of Bond;
Assignments of Error;
Bond on Writ of Error;
Writ of Error;
Citation;
Order Directing Transmission of Original Exhibits;
—and any and all other record entries, pleadings, proceedings, [188] papers and filings necessary or proper to make a complete record upon said Writ of Error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1914. A. L. Richardson, Clerk. [189]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,
Plaintiff,
vs.
POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable Judges of the District Court of the United States for the District of Idaho, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Potlatch Lumber Company, a corporation, plaintiff in error, and Susan Harkins, defendant in error, a manifest error hath happened to the great damage of the Potlatch Lumber Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath *been, a* full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the city of [190] San Francisco, in the State of California, on the 23d day of February, 1914, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of January, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal] A. L. RICHARDSON,
Clerk of the United States District Court for the District of Idaho, Northern Division. **[191]**

[Endorsed]: No. 553. In the U. S. District Court, District of Idaho, Northern Division. Susan Harkins, Plaintiff, vs. Potlatch Lumber Company, Defendant. Writ of Error. Filed February 2d, 1914, A. L. Richardson, Clerk.

Due service of within Writ of Error by receipt of a true copy thereof admitted this 30th day of Jan.

ELDER & ELDER,
Attorneys for Plaintiff. **[192]**

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Original].

United States of America,—ss.

The President of the United States to Susan Harkins and to Elder & Elder, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein the Potlatch Lumber Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of January, A. D. One Thousand Nine Hundred and Fourteen, and of the Independence of the United [193] States the One Hundred and Thirty-eighth.

FRANK S. DIETRICH,
United States District Judge. [194]

[Endorsed]: No. 553. In the U. S. District Court, District of Idaho, Northern Division. Susan Harkins, Plaintiff, vs. Potlatch Lumber Company, Defendant. Citation (on Writ of Error). Filed February 2d, 1914. A. L. Richardson, Clerk.

Due service of within citation by receipt of a true copy thereof admitted this 30th day of January.

ELDER & ELDER,
Attorneys for Plaintiff. [195]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Record.

United States of America,
District of Idaho,
State of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify that the foregoing pages numbered from 1 to 197, inclusive, together with the following exhibit, to wit, Plaintiff's Exhibit No. 1, constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 2d day of February, 1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $115.50 and that the same has been paid in full by the defendant and plaintiff in error, The Potlatch Lumber Company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of [196] Boise, in said District of Idaho, in the Ninth Judicial Circuit, this 3d day of February, 1914, A. D. and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal] A. L. RICHARDSON,

Clerk United States District Court, for the District of Idaho. [197]

[Endorsed]: No. 2374. United States Circuit Court of Appeals for the Ninth Circuit. Potlatch Lumber Company, a Corporation, Plaintiff in Error, vs. Susan Harkins, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Received and filed February 6, 1914.

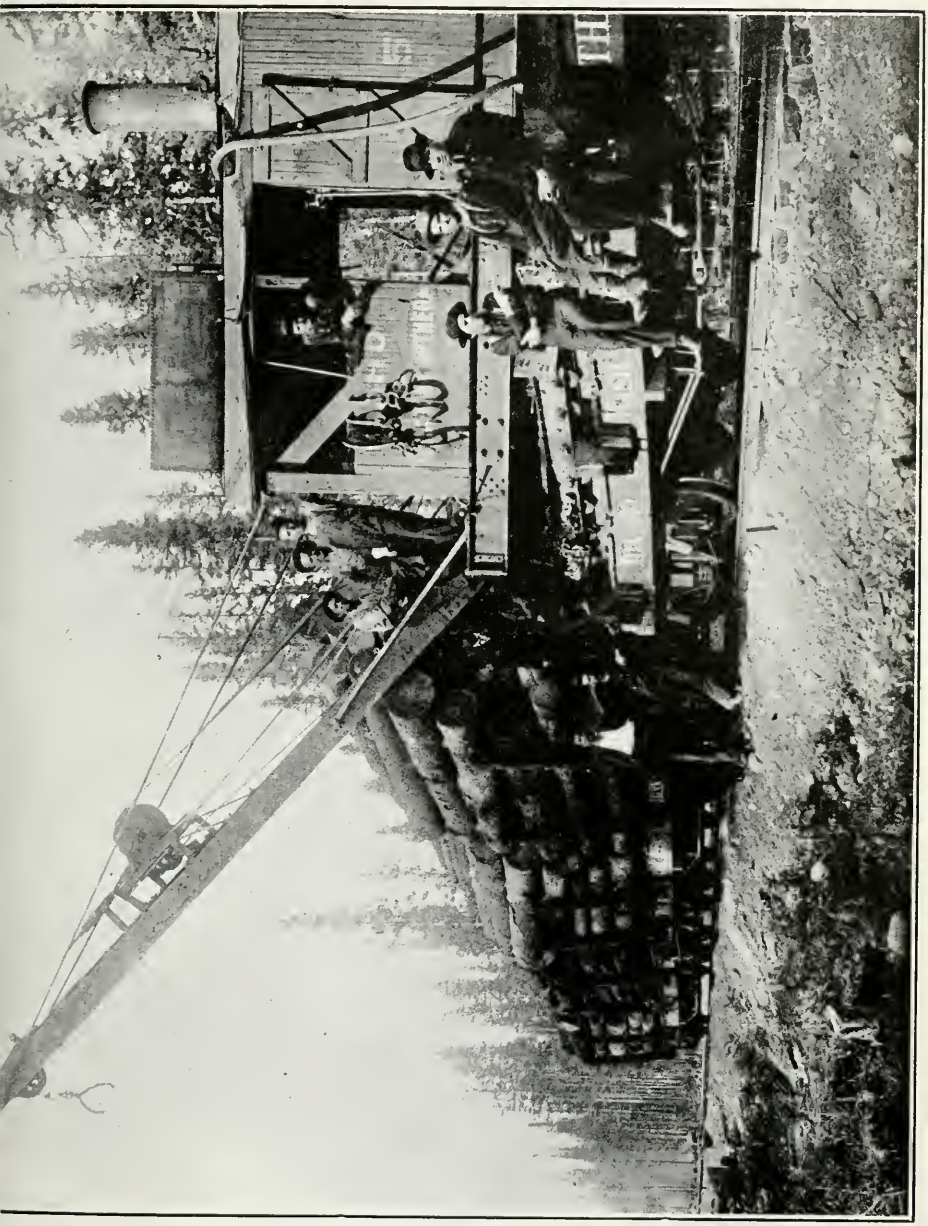
FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

Plaintiff's Exhibit No. 1.



[Endorsed]: Case No. 2374. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Received Feb. 6, 1914. F. D. Monckton, Clerk.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY,
a Corporation,
Plaintiff in Error,
vs.
SUSAN HARKINS,
Defendant in Error.

No. 2374

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

This action was commenced by the defendant in error to recover damages on account of the death of her husband, Harry Harkins, who was killed while employed by plaintiff in error skidding logs in the woods near Bovill, Idaho. The trial below resulted in a verdict in favor of defendant in error for $5000.00 and costs. There is practically no dispute as to the facts regarding the accident and the only negligence charged in the complaint is that the Marion Steam Loader, which plaintiff in error was using for skidding logs, was not suitable or adapted to be used as a skidding machine.

At the time of the accident the crew, of which deceased was a member, was engaged in skidding logs with a Marion Steam Loader a distance of three hundred or four hundred feet (31). The men, including deceased, had pulled a cable, with which the logs were hauled in, out about three or four hundred feet where the cable was hooked onto a log (42). The deceased, however, had gone out only a short distance and, when last seen, prior to the accident, was standing on a log about fifty or sixty feet to one side and about half way out to the end of the cable, where he had been for two or

three minutes before the engine started to pull in the log (32-36-37-43). He had no duty to perform at this point and there seems to be no reason for his being there (32-33). Sometimes the men were arranged along between the engine and the end of the cable for the purpose of giving signals but, at the time of the accident, this was not done as all the men were in plain view of the engineer and the signals could be seen by him when given (43-61). After the cable had been pulled out by the men, the log was hooked on and the engineer given a signal to haul it in (32). As this particular log was being hauled in it struck against a tree knocking it down and the tree struck Harkins, killing him (32-37-38). Before starting to haul in the log the engineer looked over to where he had last seen the deceased but he was not in sight, having disappeared from view in the brush (44). The men had been doing the same kind of work in the same manner and with the same machine for two weeks or more before the accident, during all of which time, the deceased had been assisting them and he had also been employed in the same crew for a period of two months or longer (41-42).

It is conceded that the machine was in perfect

condition and entirely free from defects; that the accident was not due to the carelessness or negligence of any of the employees of the plaintiff in error and the defendant in error seeks to recover upon the sole and only ground that a Marion Steam Loader was not a proper machine with which to skid logs, in that it was not equipped with a haul back line or signal cord. The only evidence tending to show that the Marion Steam Loader was not a suitable machine for skidding logs or not in general use for such purpose is that several witnesses testified they had never seen them used for skidding logs for a greater distance than seventy-five feet (35-59-90-95-100). On the other hand the testimony shows conclusively that the Marion Steam Loader or other machines of a similar character are in general use all over the country for the purpose of skidding logs within a radius of five hundred feet or less (77-125-126-130-135-139-144-145-146-154-155-156-159-165), and that it is neither customary nor practicable to equip such machines with haul back lines for skidding logs within that radius (79-128-135-136-147-156-157-160-166).

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to permit witness Harry Younkins to answer the question propounded to him by plaintiff in error upon cross examination as to whether the work was not being done, at the time in question, in the most practicable, customary and usual manner (81), upon the ground that said question was leading, to which ruling of the Court plaintiff in error excepted and exception was allowed.

II.

The Court erred in refusing to permit the witness Harry Younkins to answer the question propounded to him by plaintiff in error upon cross examination as to whether or not the use of the Marion Steam Loader was any more dangerous than if a slide had been used (85), upon the ground that said question was leading, to which ruling of the Court plaintiff in error excepted and exception was allowed.

III.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the

Marion Steam Loader was a reasonably safe machine for the purposes for which it was being used (126), to which ruling of the Court plaintiff in error excepted and exception was allowed.

IV.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the work was being done in a reasonably safe and customary manner at the time of the accident (126), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the dangers and hazards thereof, to which ruling of the Court plaintiff in error excepted and exception was allowed.

V.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the Marion Steam Loader for hauling logs in under the circumstances related is or is not a reasonably safe machine for that purpose (128), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the hazards and dangers thereof, to which ruling of the Court plaintiff in error excepted and exception was allowed.

VI.

The Court erred in refusing to permit the witness R. M. Hart to state whether or not the Marion Steam Loader or machines of similar character was in general use throughout the country for the purpose of skidding logs within a radius of five hundred or six hundred feet (139), it having been shown that said witness had full knowledge of the subject and was qualified to testify relative thereto, to which ruling of the Court plaintiff in error excepted, and exception was allowed.

VII.

The Court erred in refusing to permit the witness R. M. Hart to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (141), it having been shown that said witness was an experienced man in that class of work and had full knowledge of the dangers and hazards relative thereto, to which ruling of the Court the plaintiff in error excepted and exception was allowed.

VIII.

The Court erred in refusing to permit the wit-

ness T. P. Jones to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (149), it having been shown that said witness had thirty years' experience in that kind of work, and was qualified to testify with reference thereto, to which ruling of the Court the plaintiff in error excepted and exception was allowed.

IX.

The Court erred in refusing to permit the witness Norris B. Murphy to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (160), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the hazards and dangers relative thereto, to which ruling of the Court plaintiff in error excepted, and exception was allowed.

X.

The Court erred in refusing to permit the witness Michael J. Ward to state whether or not, in his opinion, the Marion Steam Loader was a reasonably safe machine for the purpose of skidding

logs within a radius of five hundred feet (167), it having been shown that said witness had had an experience of twenty-five or thirty years in that class of work and was thoroughly familiar with the hazards and dangers relative thereto, to which ruling of the Court plaintiff in error excepted and exception was allowed.

XI.

The Court erred in refusing to grant plaintiff in error's motion for a directed verdict in its favor made at the close of all the testimony in the case, which motion was based upon the ground that defendant in error had failed to show any actionable negligence whatsoever on the part of plaintiff in error and that the evidence showed conclusively that the death of deceased was due solely and alone to an accident which could not have been foreseen or anticipated, and that the evidence showed that the Marion Steam Loader was a reasonably safe machine for the purpose for which it was being used and that it is a machine which is in general use throughout the country, and that the deceased, in entering upon and remaining in the employ of the plaintiff in error in the work in which he was engaged,

assumed all risks and dangers incident to the operation of said machine in the manner in which it was being operated at the time of the accident (171), to which ruling of the Court plaintiff in error excepted and exception was allowed.

XII.

The court erred in refusing to instruct the jury to return a verdict for the defendant, for the reason and upon the grounds, and each and all of them, as stated in specification No. XI, to which ruling of the Court plaintiff in error excepted and exception was allowed.

XIII.

The Court erred in giving the jury the following instruction:

> "To explain, suppose the defendant employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs this particular accident of course, would not have occurred; it wouldn't have occurred in just this way. But the question still remains whether this method is more hazardous and unreasonably hazardous, more hazardous

than the method of skidding the logs by use of horses.

So, referring to the matter of using a signal device and a haul back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul back'' (178).

To the giving of which instruction plaintiff in error excepted and exception was allowed.

XIV.

The Court erred in entering judgment upon the verdict of the jury in favor of the defendant in error, for the reasons and upon the grounds, and each and all of them stated in Specification of Error No. XI., to which entering of judgment plaintiff in error excepted and exception was allowed.

ARGUMENT AND AUTHORITIES.

SPECIFICATION OF ERRORS XI., XII. AND XIM.

It is conceded that the Marion Steam Loader was in perfect condition and that the accident resulting in the death of deceased was not due to any negligence on the part of plaintiff in error, unless the use of the machine in question, for the purpose of skidding logs was in and of itself such actionable negligence as to entitle defendant in error to recover. The negligence relied upon by defendant in error is that the Marion Steam Loader was not equipped with a haul back line or signal cord, and for that reason was an unsafe and dangerous appliance to be used for the purpose of skidding logs. It appears in the evidence, however, that the men whose duty it was to give signals to the engineer, including deceased, were in plain sight of the engineer, and the absence of a signal cord was in no way the cause of the accident, as it was always customary for signals to be given by hand when this could be done. The only questions to be decided therefore are whether it was negligence for plaintiff in error to skid or drag logs a distance of three hundred or four hun-

dred feet without having a haul back line upon the machine, and if so, was such negligence the proximate cause of the death of deceased?

The only duty the master owes his servant is to furnish him with a reasonably safe place to work, reasonably safe tools and appliances, and competent fellow servants.

Having performed these duties, he is not responsible for accidents resulting in injury or death to his employees.

It must be conceded that an employer has an absolute right to conduct and carry on any lawful business in his own way, and use such methods and appliances as he sees fit, so long as those methods and appliances are reasonably safe, and the servant in entering and remaining in the master's employ assumes all risks and dangers necessarily incident to such use. Nor is it the duty of the master to furnish any particular kind of tools or appliances, and the mere fact that some other appliance or method may be safer than the ones adopted and used by the master does not render him liable in case of accident.

All the law requires is that the master use ordinary care in the selection of his machinery and

appliances, and he is not obliged to furnish the newest and best.

The evidence in the case shows conclusively that the machine in use and the method adopted by plaintiff in error at the time of the accident were the same as those adopted and used under similar circumstances and conditions all over the country, and common usage is the supreme test of due care in the selection of appliances and the adoption of methods for conducting one's business.

It is also shown by the undisputed testimony of the witnesses that it is not customary or usual to have a haul back line or signal cord upon any machine when used for skidding logs within a radius of five hundred or six hundred feet. How then can the plaintiff in error be said to have been guilty of negligence in using the machine in question at the time of the accident to deceased?

The only purpose of a haul back is to drag the cable back into the woods after a load of logs had been hauled in, and it was not used to prevent logs from swinging out of their regular course, nor could they be controlled to any extent by means of the haul back. None of the witnesses testified, that it was customary or usual to use a haul back

line on any kind of machine when it was used for skidding logs within a radius of four hundred or five hundred feet, and the only evidence tending to prove that the Marion Steam Loader was not a suitable and proper machine for that purpose is that two or three witnesses for defendant in error stated that they had never seen it used for skidding logs a greater distance than seventy-five feet. It appears, however, that it was operated in the same manner upon those occasions as when deceased was killed, and all the machines used for skidding logs within five hundred or six hundred feet were similar to the Marion, and in no instance was it shown that a haul back was used; in fact it conclusively appears that a haul back was never used under the circumstances and conditions existing at the time of the accident, and that its use was not practicable. The defendant in error is attempting to recover upon the theory that had the machine been equipped with a haul back line, the unfortunate accident would not have occurred, but there is no evidence to support this contention, and in any event, the mere fact that the use of some particular device or appliance might have prevented an injury is not sufficient to establish negligence on the part of the master for failure

to adopt such appliance or method.

As stated by Mr. Labatt, "evidence which merely tends to show that the particular accident which caused the injury might not have happened, if a particular precaution had been taken, goes for nothing in considering the question of legal liability on a charge of negligence." Labatt, Master & Servant, Vol. 3, Section 931.

> "The recognition of the right of an employer to carry on his business in his own way, and to adopt any pattern or description of instrumentalities which he may prefer, involves the consequence that any risk which is due merely to the character of an instrumentality, and not to its abnormal condition or intrinsically defective quality, is to be deemed an ordinary risk of the employment." Labatt on Master & Servant, Vol. 3, Section 1171.

In this case the character of the machine is the only ground relied upon for a recovery, as it is conceded to have been free from defects, and its use by the plaintiff in error was one of the ordinary risks assumed by deceased.

In the case of Hoffman vs. American Fdy. Co., 51 Pac. 386, the Supreme Court of the State of Washington uses the following language:

> "The law is well settled that the master discharges his duty when he provides machinery that is of ordinary character and reasonably safe. He is not required to furnish the newest or the best. Employers are not insurers, and the law recognizes that absolute safety is unattainable. They are liable for the results of their negligence and not for the dangers necessarily connected with the service. The risks incident to the employment are assumed by the person accepting such employment; and in the absence of statutory provision prescribing the kind or character of machinery to be used, or regulating the manner of its use, an employer who uses machinery which is in common and ordinary use in the line of business in which he is engaged cannot be held liable for an accident which might have been avoided by the use of different machinery."

In Engine Works v. Nuttall, 13 Atl. 65, the Court say:

> "The test is general use. Tried by this test, the saw of the defendant is such a one as the company had a right to use, because it is such as is commonly used by mill owners."

And again in Titus v. Railroad Company, 20 Atl. 517, the Court uses the following language:

> "No man is held by law to a higher degree of skill than the fair average of his profes-

> sion or trade, and the standard of due care is the conduct of the average, prudent man. The test of negligence in employers is the same; and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability will be imposed."

In the case of Harley v. Buffalo Car. Mfg. Co., 36 N. E. (N. Y.) 813, the Court say:

> "It must always be true that, where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants if in selecting the particular appliance he takes what, according to his judgment, is the best or most suitable, guided by his experience and observation, and those of the skilled men in his employment. Upon the evidence in this case, it cannot even be determined that the managers of the defendant erred in their judgment in the selection of this kind of fastener. But if there was an error in judgment, it was not such as to constitute that degree of negligence and want of prudence which, under the rules of law above cited, can impose liability for such an accident as this."

In the case of Ross v. Pearson Cordage Company, 41 N. E. (Mass.) 284, the Court say:

> "The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant."

The only possible ground upon which defendant in error can recover is that plaintiff in error was negligent because of having departed from custom by adopting a different method and using a machine not in general use for doing the work in which it was engaged at the time of the accident. It has been shown, however, that the Marion Steam Loader was in general use for the skidding of logs within a distance of five hundred feet, but, in any event, a mere departure from custom is not negligence. In the case of American Locomotive Works vs. White, 205 Fed. Rep. 260, the Circuit Court of Appeals for the Third Circuit discusses

this question at length, and at page 265 the Court say:

> "The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by direct testimony of witnesses. The question in most issues of negligence is whether the defendant has used ordinary care under the particular circumstances. To establish his case plaintiff must prove the circumstances; and if negligence appear *prima facie* the defendant may then reply to the charge by evidence that his conduct has accorded with the common usage of the business. Undoubtedly the plaintiff may offer evidence in rebuttal to show that the defendant's conduct was not in accord with usage, and if he may do this in rebuttal we cannot say that the trial court does not have the discretion to permit him to offer the evi-

> dence in chief. But neither in chief nor in rebuttal should a plaintiff be permitted to recover on mere proof of departure from custom, for such departure may be in the direction of greater safety as readily as in the direction of greater danger; he should always be required to prove further, somewhere in his case, that the departrue has resulted in greater danger. The general subject of usage as a test of due care is carefully discussed in chapter 6 of 1 Labatt, Master & Servant (1904), page 109, and cases in great number are referred to in the notes."

The testimony in this case is undisputed that in skidding logs within a radius of five or six hundred feet, no matter what machine was used, it was not customary to use a haul back line; and that the work was performed all over the country in the same manner as at time of accident to deceased.

In view of these facts, even conceding that the use of the Marion was a departure from custom, such departure did not result in greater danger to the servant and therefore the master cannot be held guilty of negligence.

As stated by the Circuit Court of Appeals for the Eighth Circuit, in the case of H. D. Williams Cooperage Co. vs. Headrick, 159 Fed. 680:

> "The master is not required to furnish the best, the safest, or the newest methods of operation, nor to adopt extraordinary or unusual safeguards against risks or dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances and methods. The test of the discharge of his duty is the exercise of ordinary care to supply such places, appliances and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances."

It also appears that deceased was a man of at least ordinary intelligence, had many years' experience in the woods in various capacities, and had worked with the Marion Loader skidding logs for two or three weeks or longer, during all of which time the work had been performed in the same manner as when the accident occurred. Under these circumstances, he must be held to have assumed all the risks and dangers incident to the work in which he was engaged and the manner of its performance.

Again it appears from the undisputed testimony that he had himself chosen the particular place where he was when killed, that he had no duties whatever to perform at that point, and there was no reason for the master to anticipate any danger

to him by the use of the Marion Loader for skidding purposes.

SPECIFICATION OF ERROR NO. I.

The negligence charged in the complaint is that the Marion Steam Loader, used by plaintiff in error, at time of accident, is not a suitable or proper machine for the purpose of skidding logs, but was an unsafe and dangerous appliance with which to perform work of that kind. It was therefore proper for plaintiff in error upon cross examination of defendant in error's witness Harry Younkin to ask him if they were not doing the work at such time in the most practicable, customary and usual manner under the circumstances, and the fact that the question was leading did not make it objectionable. The widest latitude is permitted in cross examination and the rules and principles of evidence do not prevent leading questions upon cross examination merely because the witness may be related to one of the parties and in the employ of the other. Furthermore, opposing counsel made no objection to the question and the trial Court abused its discretionary power in interrupting the examination of witness upon its own motion and preventing the question being

answered, as it was not called upon to decide whether the evidence sought was admissible or not. The action of the Court in this respect was clearly prejudicial to the rights of plaintiff in error, whose burden was already sufficiently great in the trial of a death case before a jury. Witness Younkin was an experienced woodsman, thoroughly familiar with the risks and dangers incident to the use of the machine in question and plaintiff in error had an absolute right to elicit from him the information sought to be obtained by the question which the Court would not permit him to answer.

SPECIFICATION OF ERROR NO. II.

The plaintiff in error also asked the same witness on cross examination whether, in his opinion, the use of the Marion Loader was any more dangerous under the circumstances than the use of the "slide," which latter machine the witness had testified was a regular skidding machine and could have been used at the time of the accident. This question the Court refused to permit him to answer upon the ground that it was leading, and because of the relation of the witness to the parties, leading questions were not permissible even on cross examination.

We submit that this action of the Court constituted error, as the plaintiff in error was entitled to have the question answered, and the rules and principles of evidence do not prevent leading questions upon cross examination merely because the witness may bear some relation to the parties litigant. The question to which objection was sustained goes to the very gist of the action, that is, was the use of the Marion Loader attended with any greater danger than those customarily and generally used for the same purpose, and the witness, who was an expert in such matters, should have been permitted to answer.

SPECIFICATIONS OF ERROR NOS. III., IV., V., VI., VII., VIII., IX. AND X.

These specifications all involve the same principle and may be discussed together.

As hereinbefore set forth, the only negligence alleged on the part of the plaintiff in error was in using a machine that was unsuitable and not adapted for skidding logs and which was dangerous and unsafe for that purpose. It became necessary therefore that plaintiff in error show, in order to disprove negligence, that the machine

in question and the method adopted were reasonably safe, and this could be done only by witnesses with knowledge and experience in work of the same character and who were competent and qualified by reason thereof to testify upon that point. It is claimed that this was the sole province of the jury, and not a subject of expert testimony, but we submit that this theory is erroneous. How can a jury of twelve men be presumed to know whether a machine or a particular method of performing work is safe or unsafe when they have had no experience in that class of work, and no knowledge of the machine in question? In order for the Court or jury to form an intelligent opinion upon the subject, the evidence of men familiar with the dangers and hazards of work of that kind, and whose experience qualifies them to testify regarding the matter, is absolutely essential, as it is not a matter of common knowledge which a jury is qualified to pass upon.

The question of whether the method adopted and machine used at the time of the accident was one requiring skill and knowledge not possessed by the ordinary man.

Smith v. Dow, 43 Wash. 407; 86 Pac. 555.

Wabash Screen Door Co. v. Black, 126 Fed. 721.

Knauf vs. Dover Lbr. Co., 20 Idaho, 773; 120 Pac. 157.

Hayes vs. Southern Pac., 53 Pac. 1001.

Murphy vs. P. T. & T. Co., 68 Wash. 650; 124 Pac. 114.

Luper v. Henry, 59 Wash. 33; 109 Pac. 208.

See also:

Indiana Bituminous Coal Co. v. Buffey, 62 N. E. 279.

Bonebrake vs. Board of Commissioners, 40 N. E. 141.

Storrie vs. Grand Trunk Elevator Co., 96 N. W. 569.

Fitts vs. Cream City R. Co., 18 N. W. 186.

Cincin. & Zanesville R. Co. v. Smith, 10 Am. Rep. 729.

In Smith vs. Dow, 43 Wash. 410, 86 Pac. 555, the Court say:

"Appellant next alleges error of the court in permitting certain witnesses to testifiy as to what they considered the proper way to tie the packages. They had previously expressed the opinion that the method used by

appellant was unsafe and not the usual method. These witnesses were qualified as experts. As such they were competent to give an opinion upon the subject."

The case of Wabash Screen Door Co. vs. Black, 126 Fed. 721, is also in point, and at page 727, the Court say:

"5. The same witness, Ward, who had some twelve years' experience about machinery, and had been employed in six or seven factories, was examined as an expert, and asked to state whether a 42-inch pulley made of wood with only two arms was safe or unsafe. This question was objected to on the ground that it was one for the jury to answer. Now it is insisted that it was too meager and did not identify sufficiently the pulley in controversy. But the question was not objectionable on the ground given the trial judge. If the present objection had been made then, the trial judge might have required the question to be made more specific. It is too late to make the objection now. Ward's competency as an expert is objected to, but we are not disposed to disturb the ruling of the trial judge on that point, and as to the weight to be given Ward's testimony, that was a question for the jury. Union Insurance Co. v. Smith, 124 U. S. 400, 423; 8 Sup. Ct. 534; 31 L. Ed. 497, and cases cited.

Error is also assigned for the admission of

the testimony of Weatherford, one of the experts, with respect to whether a pulley similar to that which burst was safe or not. The question was first objected to on the ground that it did not state the kind or material that the saw running by the pulley was cutting. This omission was supplied, and then the witness, answering the question which described in some detail the pulley, stated he did not consider it safe. It is now urged that by expressing this opinion the witness invaded the province of the jury, and we are referred to the case of Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445. In that case the company was sued for the breaking of an elevator cable which had been in use for some 13 years. An expert testified that the life of such a cable is limited to six or seven years, and was then permitted, over the objection of the defendant, to state that in his opinion it would not be prudent to keep such a cable running for more than 6 or 7 years. The Supreme Court of Tennessee pointed out in the case of Camp v. Ristine, 101 Tenn. 534, 47 S. W. 1098, that the answer to the first question was entirely competent. It was proper for the expert to testify that the life of the cable was limited to 6 or 7 years, but he was improperly allowed to go on and usurp the function of the jury by saying it was not prudent—that is, it was negligent—for the company to use the cable for more than 6 or 7 years. That was the very question the jury was to decide. Now,

in the present case, Weatherford was not asked to testify whether it was prudent for the company to use the pulley. It was for the jury to decide whether the company was negligent or not in using the pulley. But it was necessary for the jury to know whether the pulley used was safe or unsafe, suitable or defective. If it was safe it was not defective, and if it was defective it was not safe. Weatherford was permitted to testify that the pulley described to him in the question would, in his opinion, be unsafe—that is, defective—and he gave in detail the reasons for his opinion, pointing out wherein such a pulley would be inherently weak and liable to fly to pieces. Now that was peculiarly a question for an expert. The strength of materials when combined in a piece of machinery, operating in a certain way, is a thing not open to common knowledge, but requires special skill, experience, and investigation to estimate. Weatherford had qualified as an expert, and what he said came properly within the range of expert testimony."

This is the very question to be determined in the present case, and no one who has not had the actual experience in similar work can intelligently determine whether or not a certain method or machine is safe or unsafe.

In the case of Knauf v. Dover Lumber Co., 20

Idaho, 773; 120 Pac. 157, the Supreme Court of Idaho held that expert testimony was admissible to prove a proper method and whether the construction of a slasher was safe or dangerous. The Court say:

> "A number of questions similar to the above were asked and the witnesses were called upon to give opinions as to whether the hole where the respondent received the injury was of the character usually provided for slasher chains going over the floors and through holes in the floors in saw mills where the same were used, and whether the construction was proper and necessary. Counsel for appellant argue that the subject of inquiry was not of an expert character, and that the questions called for an opinion of the witness upon an issue which should have been left to, and was to be determined by the jury. Most of these questions go to matters which relate to common knowledge of the probability of the injury in case one stepped into a hole the size of the one where the accident occurred, but these questions are intermingled with questions which relate to whether the same was constructed in the manner in which other slashers which were known to be safe and not of a dangerous character were constructed usually. It is a well-known principle of law that expert evidence as to matters of common knowledge can in no way injure anyone, and it is not reversible

error to admit such evidence when offered. * * *

"In the present case the question as to the negligence of defendant in permitting the hole to be in the condition it was, and permitting it to so remain, was for the jury to determine, and the jury might be very much aided in determining this question by the evidence showing that it was maintained in such a manner as to show negligence on the part of the appellant, or where the facts were such as to require of the respondent that he should expect and look for defects in the construction, condition and operation of the chain through this hole. This would not necessarily be a matter of common knowledge, but would be the statements and experience of men familiar with the subject and might be a very great aid to the jury, notwithstanding the fact that the very question which the witness expresses an opinion upon is the question which the jury must pass upon; and in such cases the fact that the witness expresses an opinion upon a matter of common knowledge in giving his testimony is not reversible error."

The case of Hayes vs. Southern Pacific, 53 Pac. 1001, is directly in point. In that case the Supreme Court of Utah held expert testimony proper in cases of this kind and state:

"The first assignment of error which we

will consider relates to the admission of evidence. The Court permitted the witness Fitzgerald, over the objection of counsel for the plaintiff, to answer the following question: 'From your experience as a railroad engineer and your experience as a civil engineer, please state whether those sheds were carefully and properly built for the purposes for which they were erected'? Counsel for appellant insist that this action of the Court was erroneous, because, as they maintain, it was calling for the opinion of the witness on a question that the jury was to determine. No objection seems to have been interposed on the ground that the witness was not an expert, and therefore it may be assumed that he was competent to give expert testimony. The general rule is that the witness must testify to facts, not conclusions. To this rule, however, there are exceptions, and we think this question falls within the exceptions. The contention of the appellant at the trial was that the coal sheds were negligently constructed. This was controverted by the respondent and thus one of the main issues was whether they were properly erected for the purpose for which they were intended. Now, it is apparent from the evidence that these sheds are peculiar and more or less complicated structures,—results of mechanical skill—and appear to be necessary for, and used exclusively in, the business of railroading. Thus, the very nature and the use of the structure precludes the idea

that the average layman is competent to judge of their proper or improper construction. It was therefore permissible to resort to the opinion of a person possessed of such requisite mechanical skill and experience as enabled him to form a correct judgment as to whether or not the sheds were carefully and properly constructed. The building of such sheds for the business of railroading is not a subject of general knowledge, but it depends so far upon skill in and knowledge of the mechanic arts, outside the knowledge and experience of ordinary jurors, as to render the opinions of those who are competent, from special training in the art of construction, and experience, to form them, admissible. This is so because of the difficulty of placing before jurors unskilled in such matters a state of facts which would enable them to draw correct conclusions without the aid of such opinions. And such opinions are not in all cases confined to experts."

In the Murphy case an experienced lineman was permitted to testify as to how a telephone pole should have been guyed in order to make it safe, and the Supreme Court of Washington held that the question was a subject for the opinion of an expert.

In the case of Luper vs. Henry, 109 Pac. 208, witnesses were permitted to state that a certain platform was not properly or safely constructed,

and the Supreme Court of Washington held that it was a proper subject for expert testimony.

The ground relied upon for recovery in this case being that the Marion Steam Loader was an unsafe and dangerous machine for the purpose of skidding logs, the question of whether it was in fact a reasonably safe machine for that purpose was peculiarly a subject for expert testimony, as no one, other than men having long experience in the use of such machines, and thoroughly familiar with the kind of work being performed by it, could form an intelligent opinion as to its being safe or dangerous. It was, therefore, prejudicial error for the trial Court to refuse to permit the expert witnesses to testify upon this point.

SPECIFICATION OF ERROR NO. XIII.

In giving the instruction complained of, the trial Court in effect charged the jury that if the use of the Marion Steal Loader, without a haul back, was more hazardous than if the haul back had been used, they should find for the plaintiff. This instruction does not correctly state the law and the giving of it was prejudicial to plaintiff in error and constitutes reversible error. All the law requires is that the master furnish reasonably safe

machinery and appliances and the fact that one kind of appliance, or a certain method of performing work is more dangerous and hazardous than another does not make the master liable. Under the instruction given, the jury were permitted to find against the plaintiff in error if in their opinion, the accident might have been avoided by the use of a haul back, regardless of the fact that the testimony is undisputed that it is not customary anywhere to use a haul back in skidding logs a distance of five hundred or six hundred feet or less. The law imposes no such burden upon employers of labor. To do so would be to make the master an insurer.

CONCLUSION.

We submit that deceased assumed the risk of the operation of the Marion Steam Loader in the manner in which it was being operated at the time of his death; that said machine was in general use all over the country for skidding logs a distance of five hundred or six hundred feet; and that it was not negligence on the part of plaintiff in error to use it for such purpose; that it was not customary or practicable to use a haul back under the circumstances and conditions existing at time

of accident, and that the absence of a haul back was not the proximate cause of deceased's death; that the Court erred in ruling out the evidence as set forth in Specification of Errors I. to X. inclusive; and that the instruction of the Court as set forth in Specification of Error XIII. was erroneous and prejudicial to the rights of plaintiff in error. For all of these reasons we ask that the judgment be reversed and a new trial granted.

Respectfully submitted,

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